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NATIONAL LABOR RELATIONS ACT PRACTICES AND OPERATIONS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

REVIEWING PRACTICES AND OPERATIONS UNDER THE NATIONAL LABOR RELATIONS ACT

JANUARY 29 AND FEBRUARY 5, 1988

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NATIONAL LABOR RELATIONS ACT PRACTICES AND OPERATIONS

FRIDAY, JANUARY 29, 1988

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The Subcommittee convened, pursuant to notice, at 9:38 a.m., in room SD-430, Dirksen Senate Office Building, Senator Howard Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum and Harkin.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The Subcommittee will come to order.

I am very happy to have you all here today and happy to welcome my good friend, Senator Harkin.

The National Labor Relations Act was enacted over 50 years ago. At the time of its passage, the Act was hailed as a "magna carta" for American workers.

Prior to the National Labor Relations Act, the working people of this country had practically no rights. Men and women seeking to organize and bargain collectively faced almost insurmountable obstacles.

Supporters of the NLRA thought that the new law would assure workers the right to decide freely and without coercion whether they wished to bargain collectively with their employers. These supporters further believed that the NLRA would enable workers who opted for collective bargaining to deal with their employers on a more nearly-equal basis across the bargaining table. And for a time, these thoughts and beliefs became realities.

In the years following enactment of the new law, organized labor exercised its newfound strength and became a major factor on the American economic landscape. In fact, organized labor became so major a force that there was a political turnabout. The pendulum of the law swung the other way. The rights of workers to organize and bargain were restricted under the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959.

But even with these changes, the basic policy of the law remained unchanged: "encouraging the practice and procedure of collective bargaining and protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." That is the language of the law.

In recent years, however, many have expressed the view that the NLRA has failed to achieve its important goals and has become at best an outdated irrelevancy. Indeed, some unions today advise workers who wish to organize to avoid using the practices of the Act. And many labor leaders, including Lane Kirkland, President of the AFL-CIO, have suggested that American workers might be better off if the NLRA were repealed and the field of labor-management regulations were completely deregulated.

Notwithstanding the growing dissatisfaction with the NLRA, neither this Committee nor any other Senate Committee has examined in the past ten years how that Act operates in practice. I believe it is therefore appropriate for our Subcommittee to hear testimony from workers and others who have endeavored to organize or bargain collectively as to their personal experiences under the labor laws.

We also will hear from distinguished scholars of industrial relations who have studied the operations of these labor laws.

This morning, we will focus on two interrelated questions. First, how effective are the rules that are intended to protect employee free choice during organizing campaigns? Second, how appropriate are the rules defining the scope of coverage under the NLRA in today's changing economy?

This is the first of two hearings called to inquire into the effectiveness of the National Labor Relations Act as a means of regulating labor-management relations. In examining practices and operations under the NLRA, the Senate Labor Subcommittee is coordinating efforts with the House Subcommittee on Labor-Management Relations, which will hold its own hearings later this year.

Senator Harkin, do you have an opening statement?

OPENING STATEMENT OF SENATOR HARKIN

Senator **Harkin**. I have no prepared opening statement, Mr. Chairman, other than to just congratulate you for holding this hearing.

I think it is time that we do take a look at both the National Labor Relations Act and the National Labor Relations Board to see how they are functioning.

The National Labor Relations Board was set up to administer the Act, in a fair, impartial unbiased way, and to act as a good faith intermediary between organized working people of this country and the management. But under this Administration, for the last several years, the National Labor Relations Board has given up on being a good faith intermediary and in fact has become an opponent of organized labor, bending the National Labor Relations Act completely out of kilter from what it was intended to be.

There are now those who have called, as the Chairman said, for perhaps even an outright repeal of the National Labor Relations Act. I don't go that far, but I do think we ought to repeal the National Labor Relations Board as it is presently constituted. We need fair-minded people in there, individuals who understand the National Labor Relations Act and understand the value of people being able to organize and bargain collectively for their rates, hours, and conditions of employment.

So I think that with the new Administration and with an adherence to the principles enunciated in the National Labor Relations Act, and with a new National Labor Relations Board, I think many of the errors that we have seen in the past few years can be corrected.

I am anxious to hear and to read the testimony of those who are going to be here today.

Thank you very much, Mr. Chairman.

Senator **Metzenbaum**. Thank you very much, Senator Harkin.

We have three separate panels today. The Chair will ask the panelists to confine their remarks to approximately five minutes, with a little bit of leeway on that, but not much, because we hope to be able to conclude by the noon hour.

Our first panel consists of Gregory Harm, from Lincoln, NE; Norman Medows, Jacksonville, FL; Michael Kodluboy, of St. Paul, MN; and Professor William Dickens, Department of Economics, University of California, Berkeley, CA.

We will inquire into the issue of freedom of choice during representation campaigns in this first panel. Will those panelists be good enough to come to the witness table?

Mr. Harm, please proceed.

STATEMENTS OF GREGORY HARM, LINCOLN, NE; NORMAN MEDOWS, JACKSONVILLE, FL; MICHAEL KODLUBOY, ST. PAUL, MN, AND PROF. WILLIAM DICKENS, DEPARTMENT OF ECONOMICS, UNIVERSITY OF CALIFORNIA, BERKELEY, CA

Mr. **Harm**. Yes, sir. Thank you.

My name is Gregory P. Harm. I live at 922 South 11th Street in Lincoln, Nebraska. I am currently employed by Kawasaki as a maintenance apprentice in its motorcycle plant at Lincoln. I started working there on July 7th, 1975.

In the time allocated to me, I can only briefly summarize the events my coworkers and I have been subjected to, and if you will permit me, I will read from my statement about the 1982 NLRB election that they ordered.

Due to Kawasaki's pervasive unfair labor practices in the 1978 and 1979 elections, the NLRB in 1980 directed that a third election be held. Kawasaki refused to abide by the decision and appealed the decision to the 9th Circuit. The Court eventually affirmed the Board.

While the Board decision was pending review, the UAW nonetheless notified the NLRB on May of 1982 that it wished to proceed with an election. The NLRB ordered an election on October 21, 1982. Kawasaki's response to the 1982 campaign was again designed to impede the election process.

The new plant manager, Stan Hanson, issued a memorandum to all employees, warning us not to sign UAW authorization cards.

Kawasaki conducted a public media and personal in-plant campaign about the alleged financial losses incurred since the plant opened, and challenging the wisdom of opening the plant in the first place. Union activists were denied the opportunity to distribute handbills in formerly-agreed to areas.

Linda Pester was harassed and interrogated about her union activities. Her work assignment in the crib was discriminatorily changed, and despite a serious medical history, she was placed on a dirtier and heavier job.

Jerry Pike, another UAW supporter, was given a written reprimand on August 11, 1982, the day following his distribution of "The Bridge", a union newsletter, at the plant gate.

Randy Folkerts, another distributer, was also verbally reprimanded.

On October 11th, 1982, Kawasaki distributed a news letter designed to sow confusion. Its format resembled the UAW newsletter, "The Bridge", and quoted Bruce Berg, a prominent UAW supporter, who had been permanently laid off. The bogus newsletter contained a list of 60 employees who would be terminated as a result of "UAW-type job security." Only if the plant remained non-union, the newsletter suggested, could the company avoid more massive layoffs and probably closing.

The company's illegal threats had their intended result. Employees whose support for the union had been assured became convinced that voting yes was voting for layoffs and probably a plant shutdown. For example, Michael Danahay, who had been a union supporter, said frankly, "I am going to have to vote no. I have a family to support, and I cannot take a chance." Sandra Schantel, a leading union supporter since 1979 and the head of a household with three dependent children, requested that her authorization card be returned.

The continued threats of layoffs and plant closings had their intended result: support for the union eroded. The union organizing committee had become increasingly alarmed about overcoming the impact of these threats without any effective ability to reply. It therefore asked for an indefinite postponement of the election scheduled for October 21, 1982.

Over a period of time, the complicity of Kawasaki Heavy Industries has become more evident. The Japanese parent played a direct role in the events preceding the scheduled 1982 election. Prior to that election, the parent sent two officials, Takehiko Saeki and Kichiro Ando, to work at the plant. Mr. Saeki was made president of the operation.

Within three days of the scheduled election, Mr. Saeki led 11 captive-audience meetings at the plant during working hours. Employees were required to attend. The meetings consisted primarily of intimidation and veiled threats designed to coerce employees. Reports were made regarding operating losses at the Lincoln plant, the unimportance of the Lincoln facility in the Kawasaki network, the attractiveness of Kawasaki plants in overseas countries with lower labor costs, and the need to reduce costs and improve productive to avoid a plant shutdown. Mr. Saeki stated that he had been sent by headquarters to determine whether the plant should be closed. He indicated that if the Lincoln plant did not begin to show a profit "by the end of the year"—less than three months away—the Lincoln facility would be shut down.

The Judge subsequently found that,

> The credited evidence in this case reveals that the Respondent, Kawasaki, by President Saeki and Plant Manager Hanson, the highest authorities in the Compa-

> ny, told the companies for the first time and just before an election that the Respondent's financial condition was bleak, dismal and precarious; that Saeki had been sent from Japan either to close the plant or to make it profitable.

Following each of these talks and question and answer sessions, the company showed a videotape intended to convey falsely negative impressions of unions generally and the UAW in particular. It pictured and listed plants that had closed during the automotive depression of 1981-82. The accompanying commentary in effect stated that the UAW victory would jeopardize the plant's future.

The narrator of the film states that the UAW has a "national goal of making Japanese producers uncompetitive."

The film also presented a deceptive montage of brief views of the local plant, the UAW symbol, peaceful UAW pickets, alternated with violent strike scenes not involving the UAW.

The 1982 election threats were not quite as blunt at the 1978-79 plant closing threats. But while more subtle, these threats were delivered by higher-level company officials from Japan meeting with assembled employees two and three days before the scheduled election and telling employees that the plant had to be turned around in three months or be closed.

As the Judge put it:

> No reasonable employee who sat through the foregoing meetings or viewed the videotape could have been so dense as to have missed the employer's message that, if the UAW won the upcoming election, the Respondent's plant would close and their jobs would no doubt be moved to Japan.

For the third time, the UAW then filed charges protesting Kawasaki's election misconduct. Despite the backdrop of the illegal plant closings in the 1978 and 1979 elections, the Board held that Kawasaki's conduct involved lawful predictions, not illegal threats.

In December 1987, the 9th Circuit affirmed the Board's decision.

Kawasaki has never explained to its Lincoln work force that it bargains with unions in the other countries where it has threatened to shift production. In each campaign, Kawasaki has intimidated and fired key union supporters. It has used legal counsel with a reputation for thwarting the free election of unions.

Through all these tactics, Kawasaki has prevented its employees from enjoying a free and fair election since 1978. It gives no indication that it intends to act any differently in the future. It is bad enough that American companies do not respect worker rights. Now, a Japanese company, which wouldn't think of such anti-worker conduct in Japan, is following the same path.

That is the conclusion of my statement.

[The prepared statement of Mr. Harm:]

TESTIMONY OF GREGORY HARM
EMPLOYEE OF KAWASAKI
MOTORS MANUFACTURING CORPORATION
before the
SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
January 29, 1988

My name is Gregory Harm. I live at 922 South 11th Street, Lincoln, Nebraska 68508. I am currently employed by Kawasaki as a maintenance apprentice at its motorcycle plant in Lincoln. I started working there on July 7, 1975.

The 1976 Organizing Drive

Shortly after I started working for the company, many of the Kawasaki workers began discussing the need for a union. Many issues were involved in this decision: forced overtime, arbitrary discharges, health and safety and wages.

We first went to the Teamsters in late 1975 and later approached the Allied Industrial Workers of America (AIW). We started passing out AIW cards in the plant in 1976. However, this drive came to a halt when Kawasaki terminated Gary Rumbaugh on October 6, 1976. Rumbaugh had been the chief in-plant organizer and had passed out most of the AIW cards at the plant. While the Administrative Law Judge found that the discharge was in reprisal for union activity, the National Labor Relations Board reversed by a 2 - 1 vote in 1977. See 231 NLRB 1151.

The 1978 Election

We then turned to the United Auto Workers (UAW). In 1978, when the UAW announced that Kawasaki workers had asked to be represented by the UAW, Kawasaki sought out the services of a labor law attorney to combat the organizing drive. The law firm selected, Tate, Bruckner, Alaniz & Sykes, has been widely known for counseling employers in campaigns to frustrate legitimate collective bargaining activities of employees. It has been involved in some of the most vicious and violent anti-union struggles in the United States. The lawyers in this firm publicly advertise themselves as successful union busters. The responsibility of this firm, for flagrant abuses of labor law by its clients, has been cited in numerous cases as well as in congressional hearings.[1]

In June, 1978, prior to the first National Labor Relations Board (NLRB) election, Kawasaki threatened its employees that it would close the plant or move its operations back to Japan if the employees voted in favor of the Union. Over the years, such threats to close have remained a dominant theme in Kawasaki's anti-union campaign. Such unlawful threats have long been recognized as the most powerful weapon in intimidating and discouraging employees from joining a union. Kawasaki's conduct had the predictable effect of interfering with the conduct of a free election and preventing the workers from selecting the UAW as their bargaining agent.

Kawasaki's 1978 election conduct, orchestrated by Tate, Bruckner, Alaniz & Sykes included:

1. threats to employees of loss of jobs;
2. threats of loss of benefits (or promotions to permanent status);
3. changes in job classifications (from permanent to temporary and vice-versa);

---

[1] See Subcommittee on Labor-Management Relations, Committee on Education & Labor, U. S. House of Representatives. Oversight Hearings on the National Labor Relations Act, February 19, 1976, p. 71 - 125; Oversight Hearing, Pressures in Todays Workplace, October 17, 1979, p. 190 - 291; Oversight Hearings on the Landrum-Griffin Act, February 7, 1984, p. 41-50. The same firm continued to represent Kawasaki throughout the period covered by this chronology although, when Mr. Tate subsequently left, the firm's name changed to Bruckner & Sykes.

4. establishment of an anti-UAW employee committee to funnel corporate funds into anti-union buttons, insignia and activity;
5. daily meetings with supervisors, "supervisory trainees" and publication of a handbook for supervisors, detailing "union avoidance" techniques to be used in combating the organizing efforts of employees.

One week prior to the election, Kawasaki's consultant-law firm and an "employee" committee (dominated by the Company) accused the UAW of not properly reporting union payments in accordance with the law and of misconduct during the recent Delavan strike in the adjoining state of Iowa. Although the accusations against the UAW were replete with errors, the UAW was unable to make an effective reply because they were made just before the election.

Nearly 200 of the employees eligible to vote in the elections were temporary workers for whom the threats of loss of jobs in the event of a union victory seemed all too real. Many were bluntly told by Kawasaki officials that they would be terminated if the Union won the election because the UAW would not allow "temporary" workers.

Linda Pester, a member of the 1978 and subsequent organizing committees was interrogated during her hiring interview as to her union sympathies and was told by Kawasaki officials that the Union would not be tolerated.

Rebecca Chen, a temporary employee, refused to support the efforts of her sister on the organizing committee because she had been told the company would fire all temporary workers if the union won the election. Rebecca's husband was also a temporary worker.

As a result of these intimidating and misleading threats and accusations, the UAW lost the election by a vote of 135 to 257. The UAW filed objections.

In October, 1978, during the NLRB hearing, Kawasaki agreed:

1. to have a rerun election;
2. not to interfere with the employees' rights to join the UAW or to select the UAW as their representative and to post a notice to that effect; and
3. not to threaten to close or relocate the plant in the event the employees voted for the UAW.

The 1979 Election

The second election was held on April 19, 1979. Contrary to its signed commitments, Kawasaki repeated its pattern of interference and intimidation. It repeated the same threats to close the plant or to remove the work to Japan; it threatened to reduce benefits if the employees elected a union; it threatened that selecting the UAW would result in violent strikes; and it illegally discharged an employee (Dan Bennett) who was a principal in-plant leader of the organizing drive.

Dan Bennett was discharged on April 10, 1979 (nine days before the election) to place a chill over the pending re-run election. Bennett was widely recognized as a key supporter of the UAW. In the words of the Administrative Law Judge:

> "Bennett was subjected to summary, harsh discipline because of a desire by the Respondent [Kawasaki] to rid itself of his union activity shortly before the election."

By court order, Bennett was reinstated in March of 1983. Kawasaki is still contensting his back-pay and a Company official has bragged that it will be another three to six years before Bennett is made whole.

In the March-April, 1979 pre-election period, Kawasaki employees were also subjected to a variety of anit-union activity characterized by the trial judge as showing "virulent hostility to unionization." These acts included:

1. Bennett was informed a few days prior to his discharge that his recent purchase of a motorcycle was foolish since he had no continued assurance of employment.
2. Employee Clover was told that if she continued to wear her union button, her foreman Dick Weyers would give her a "dirty job."
3. Employee Steve Thiellen and other employees were told their promotions were "hung-up" because of the union election. In the same meeting, they were warned that their plant was a "very severable arm" of Kawasaki.
4. Supervisor Max Hosek told his employees that the Lincoln plant was a "drop in the bucket" to Kawasaki and that if the union got in, the plant would close.
5. Foreman Max Hosek told employee Ivan Slossen that he had better buy new shoes because, if the union got in, he would have to do a lot of walking (i.e., there would be a long strike with heavy picket line duty requirements.)
6. Employees Jerry Schofield, Bill Keyes and Tom Esch and myself were told that if the union got in, the plant would close. When we protested the threat, we were told if we didn't like it we could go to Russia. Foreman Van DeWalker participated in the discussion.
7. Plant Manager Dennis Butt posted a notice falsely implying that the UAW was respolnsible for certain alleged bomb threats at the plant. Butt also stated that he knew the UAW has had its members push baby carriages in front of moving cars to stop them from going into a plant.
8. Georgia Kalmbraun and Dean Strough were told by foreman Van De Walker "the plant would close if the union got in."

9. Plant Manager Dennis Butt, together with Mr. Yamada, a visiting Kawasaki official, in a meeting with all plant employees, promised to increase wages if he was "given a chance" — thereby illegally conditioning wage increases upon the employees' rejection of the Union.

10. Personnel Manager Bob Summers distributed pro-Kawasaki buttons to emloyees thereby forcing employees to make known their union sympathies.

11. Plant Manager Dennis Butt held a meeting with all employees, and the entire plant was shut down and all machinery turned off. Following the silence, Butt stated that the silence was the silence of the UAW on strike. Chris Baker, a professional strike-breaker, hired by Kawasaki as an hourly employee the week before the election, was introduced to talk about another UAW strike. Baker then toured the plant to talk to employees individually about the strike, falsely blaming it and the violence on the UAW. Baker terminated his employment immediately after the election.

These events and the election occurred even as notices were posted in the plant citing Kawasaki's agreement not to interfere with employees' choice of a union and not to threaten closure because of the union. The UAW failed to win the second election by a vote of 207 to 257 and filed new objections and charges with the NLRB. During the trial on these charges, the judge rejected Kawasaki's request to enter into still another settlement agreement by noting in the record:

> In short, I know of no valid reason many employees, either witnesses to or victims of unlawful action by the Respondent [Kawasaki] might have for trusting the words of the Respondent regarding its intentions to refrain from illegal activities in the future.

The 1982 Campaign

Due to Kawasaki's pervasive unfair labor practices in the 1978 and 1979 elections, the NLRB in 1980 directed that a third election be held. See 257 NLRB 502 (1981). Kawasaki refused to abide by the decision and appealed the decision to the 9th Circuit. The Court eventually affirmed the Board. See 691 F.2d 507 (1982).

While the Board decision was pending review, the UAW nonetheless notified the NLRB in May of 1982 that it wished to proceed with an election. The NLRB ordered an election to be conducted on October 21, 1982.

Kawasaki's response to the 1982 campaign was once again designed to impede the election process. The new plant manager, Stan Hanson, issued a memorandum to all employees warning them not to sign UAW authorization cards.

Earlier that year, Kawasaki and its consultant law firm had created a new corporation for the warehouse in the plant where many union supporters were employed. Even though they continued to do the same work in the same plant, these workers were denied the right to vote for a union with the assembly workers because, as a technical legal matter, they worked for a separate corporation. Ironically, in 1978, when few union supporters worked in the warehouse, Kawasaki had argued for them to be included in the same voting unit on the grounds that the warehouse was integral to their overall operations and that warehouse employees shared a "community of interest" with employees in the main plant. By this warehouse maneuver, Kawasaki spun off the warehouse function and thereafter permanently laid off all warehouse employees. Because it was now a separate corporation, the warehouse employees were not permitted to return to the main plant where they were originally hired.

In July 1982, the U.S. Court of Appeals for the 9th Circuit ruled that Kawasaki must cease and desist from its prior unfair labor practices and must reinstate Bennett with all seniority and back pay. This decision was subsequently upheld by the Supreme Court, but Kawasaki is still in litigation as to some of the back pay owed Dan Bennett. Kawasaki officials have predicted it will be another three to six years before Bennett gets his backpay due to his illegal discharge in 1979.

Kawasaki conducted a public media and personal in-plant campaign about the alleged financial losses incurred since the plant opened and challenging the wisdom of having opened the plant in the first place — obviously threatening once again that a shutdown was pending.

Union activists were denied the opportunity to distribute handbills in formerly agreed-to areas. Linda Pester was harassed and interrogated about her union activities. Her work assignment in the crib was discriminatorily changed and, despite a serious medical history, she was placed on a dirtier and heavier job.

Jerry Pike, another UAW supporter, was given a written reprimand on August 11, 1982, the day following his distribution of "The Bridge", a union newsletter, at the plant gate. Randy Folkerts, another distributer, was also verbally reprimanded.

As election day neared, similar harassment of union activists occurred and the tension increased. Kawasaki's attorneys used various techniques to delay the impending election and avoid compliance with the various court orders. On October 5, the consultant-attorney sought a delay in the scheduling of the election on the hypothetical argument that there had been a corporate name change. When the National Labor Relations Board refused to delay the election further, the terror inside the plant increased. All during this legal maneuvering, Kawasaki officials in the plant continued to make threats and discriminate against UAW supporters.

On October 11, 1982, Kawasaki distributed a "newsletter" designed to sow confusion. Its format resembled the UAW newsletter "The Bridge", and it quoted Bruce Berg, a prominent UAW supporter, who had been permanently laid off through the warehouse maneuver. This bogus newsletter contained a list of 60 employees who would be terminated as a result of "UAW type job security." Only if the plant remained non-union, the newsletter suggested, could the Company avoid more massive layoffs and the probable closing.

Earlier, the Company had put out a letter to the employees which stated that the 60 lowest seniority employees in the plant would have been laid off under a UAW contract. At the time, the Company had initiated a reduced work week in the plant. The Company was warning the employees that the Company had curtailed the workweek rather than let 60 employees (about 20% of the workforce) be laid off, whereas had there been a UAW contract, those 60 emloyees would have lost their jobs. The threat was plain. The targeted employees, 80 percent of whom were UAW card signers, were terrified.

The Company's illegal threats had their intended result. Employees whose support for the union had been assured became convinced that voting yes was voting for layoffs and probably a plant shutdown. For example, Michael Danahay, who had been a union supporter, said frankly, "I'm going to have to vote 'NO.' I have a family to support and I can't take a chance." Sandra Schantel, a leading union supporter since 1979 and the head of a household with three dependent children, requested that her authorization card be returned.

The continued threats of layoffs and plant closings had their intended result: support for the union eroded. The union organizing committee became increasingly alarmed about overcoming the impact of these threats without any effective ability to reply. It therefore asked for an indefinite postponement of the election scheduled for October 21, 1982.

Involvement of Kawasaki Heavy Industries

Over a period of time, the complicity of Kawasaki Heavy Industries has become more evident. When they met with UAW officials in Japan in 1980, after the first two elections, Kawasaki headquarters executives claimed ignorance of misconduct and claimed they did not direct the policies of their managers in the United States. However, the Japanese parent played a direct role in the events preceding the scheduled 1982 election. Prior to that election, the parent sent two officials, Takehiko Saeki and Kichiro Ando, to work at the plant. Mr. Saeki was made President of the operation.

Within three days of the scheduled election, Mr. Saeki led eleven captive-audience meetings at the plant during working hours. Employees were required to attend. The meetings consisted primarily of intimidation and veiled threats designed to coerce employees. Reports were made regarding operating losses at the Lincoln plant, the unimportance of the Lincoln facility in the Kawasaki network, the attractiveness of Kawasaki plants in overseas countries with lower labor costs, and the need to reduce costs and improve productivity to avoid a plant shutdown. Mr. Saeki stated that he had been sent by headquarters to determine whether the plant should be closed. He indicated that if the Lincoln plant did not begin to show a profit "by the end of the year" (less than three months away), the Lincoln facility would be shut down.

An Administrative Law Judge (ALJ) subsequently found that:

> The credited evidence in this case reveals that the Respondent (Kawasaki), by President Saeki and Plant Manager Hanson, the highest authorities in the Company, told the employees for the first time and just before an election that the Respondent's financial condition was bleak, dismal, and precarious; that Saeki had been sent from Japan either to close the plant or to make it profitable; that although the plant had never shown a profit, the plant must show a profit or break even by the end of the year, less than 3 months away; that KHI had made a decision

to accept no more losses; that, if the employees showed an effort, the Japanese would work with them and not "dump" them; that with its financial problems, the Respondent could not handle the additional problems which the selection of the UAW as bargaining agent would cause at the present time and reach a profitable operation; that the Respondent could not handle another problem and survive; that a UAW contract with its restrictions would not allow the Respondent the versatility it needed to continue the business; that the plant could not operate and make a profit without versatility; that lack of versatility would cause layoffs; that the Respondent's inventory was such that the plant could be closed (except for the manufacture of three products) for an average of 2 years and 8 months before its inventory would be exhausted; that if the UAW were chosen as the bargaining agent the Respondent would commence bargaining on a clean table from scratch; and the very survival of the plant's operation depended on the outcome of the election. See 280 NLRB No. 53.

The Deceptive Videotape

Following each of the talks and question and answer sessions, the Company showed a videotape intended to convey a falsely negative impression of unions generally and the UAW in particular. It pictured and listed plants that had closed during the automotive depression of 1981-82. The accompanying commentary in effect stated that a UAW victory would jeopardize the plant's future. The narrator of the film states that the UAW has a "national goal of making Japanese producers uncompetitive." However, the UAW has advised me that they have numerous UAW labor agreements (in effect for many years before the film and continuing) with such Japanese affiliates as Hitachi Magnetic Corp. (UAW Local 1436), Hitachi Magna-Lock (UAW Local 389), Suzuki Motor Corp. (UAW Local 1612), Honda Motor Co. (UAW Local 1612 and 1224), NUMI (a joint venture between Toyota and GM) (UAW Local 2244), and more recently began negotiations with Mazda (UAW Locals 3000 and 260).

The film also presented a deceptive montage of brief views of the local plant, the UAW symbol, peaceful UAW pickets, alternated with violent strike scenes not involving the UAW. This was designed to give the impression that selection of UAW representation would inevitably mean violent strikes at this plant.

The 1982 election threats were not quite as blunt as the 1978-1979 plant closing threats. But while more subtle, these threats were delivered by higher level company officials from Japan meeting with the assembled employees two and three days before the scheduled election and telling employees that the plant had to be turned around in three months or be closed.

As the Administrative Law Judge put it:

> "No reasonable employee who sat through the foregoing meetings or viewed the videotape could have been so dense as to have missed the Employer's message that, if the UAW won the upcoming election, the Respondent's plant would close and their jobs would no doubt be moved to Japan."

For the third time, the UAW then filed charges protesting Kawasaki's election misconduct. In June, 1984, the Administrative Law Judge (ALJ) held that Kawasaki had illegally threatened plant closures, strikes and bargaining from scratch if the employees voted for the UAW. In June, 1986, the Board reversed the ALJ and dismissed the Complaint. Despite the backdrop of the illegal plant closing threats in the 1978 and 1979 elections, the Board held that Kawasaki's conduct involved lawful predictions, not illegal threats.

In December, 1987, the 9th Circuit affirmed the Board's decision.

Summary and Conclusion

To intimidate its Lincoln employees from forming a union, Kawasaki has exploited its position as a multi-national enterprise producing similar products in other countries. Since 1978, Kawasaki has repeatedly threatened that, if the Lincoln employees chose to be represented by a union, it would close their plant and shift production to one of its foreign plants. Kawasaki's threat to shift production to other plants was the most potent weapon

Kawasaki could use to intimidate its employees. The NLRB, in two prior elections, found such threats to be illegal and ordered Kawasaki not to make such threats again. In 1982, Kawasaki again threatened to close the plant and now the NLRB says such conduct is employer "free speech."

This concern for protecting employer "free speech" is really ironic. Kawasaki can conduct its campaign through daily captive-audience meetings, letters to employees' homes, one-on-one meetings on the job, bulletin board notices, etc. By contrast, we have to handbill outside the plant and when we finally get an employee "name and address" list (just before the election), it usually is filled with errors. We have no right to conduct captive-audience meetings or use the bulletin boards. If we violate Kawasaki's solicitation rules, we're fired. When Kawasaki repeatedly violates the law and its own promises to avoid threats of plant closings, the NLRB remedy is to just hold another election.

Kawasaki has never explained to its Lincoln workforce that it bargains with unions in the other countries where it has threatened to shift production. In each union campaign, Kawasaki has intimidated and fired key union supporters. It has used legal counsel with a reputation for thwarting the free selection of unions.

Through all these tactics, Kawasaki has prevented its employees from enjoying a free and fair union election since 1978. It gives no indication that it intends to act any differently in the future. It's bad enough that American companies don't respect worker rights. Now a Japanese company, which wouldn't think of such anti-worker conduct in Japan, is following the same path.

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Senator **Metzenbaum**. Thank you very much, Mr. Harm.

I think I am going to follow the procedure of asking questions as the witnesses conclude.

First of all, I want to commend you on your courage for coming here to testify, because with a company that has had a record such as this, I think it does indeed take a lot of courage to be here.

Mr. **Harm**. Thank you.

Senator **Metzenbaum**. I want to send a message to Kawasaki that they had better not take any action in connection with your expressing your right to be heard before a committee of the United States Congress, because from what your statement says, I frankly have some concerns along that line. So, Kawasaki, don't take any action against Mr. Harm, or you are going to have a lot of us in this Congress on your back.

Mr. **Harm**. I appreciate that.

Senator **Metzenbaum**. Well, I think it does take a lot of courage, and your statement was a very full one.

Senator Harkin, do you have any questions?

Senator **Harkin**. I do not have any, Mr. Chairman, other than to echo what you just said.

Senator **Metzenbaum**. Thank you very much.

Mr. **Harm**. Thank you, gentlemen.

Senator **Metzenbaum**. Our next witness is Norman Medows, Jacksonville, Florida.

Mr. **Medows**. My name is Norman Medows, and I live in Jacksonville, Florida. I work for Crane Resistoflex in Jacksonville.

Crane is a defense contractor that makes high-pressure hydraulic fittings and aviation equipment for NASA and the Department of Defense and other government agencies.

I have worked at Crane for about 14 months, which is about as long as Crane has been in Jacksonville. Before that, the work now done in Jacksonville was done in a New Jersey plant, which was closed and moved to Jacksonville. A number of the supervisors were moved to Jacksonville from Jersey, but none of the hourly work force.

I am here to tell you about my experiences in trying to organize a union at Crane.

Thus far, the efforts by myself and other Crane employees have been unsuccessful, although we intend to keep trying. It is clear to me that the reason for the lack of our success has been the company's ability and willingness to intimidate the workers at Crane into being afraid to exercise their rights.

I hope my experience will help show you that employers can make a mockery of the law in order to prevent unionization.

After working at Crane about six months, I and a number of other employees became interested in organizing a union. Our reasons were principally that we felt the company treated the employees with absolutely no respect. In particular, the company assigned jobs, shifts, and promotions according to favoritism and showed very little concern for the safety of the employees.

We began by calling a local office of the United Steelworkers, and after talking to the Steelworkers organizer, we started talking to our fellow employees about the union. We asked the people to sign union cards and come to union meetings.

In the first two months, more than 50 of the approximately 80 Crane employees had signed cards and told us they wanted a union. Even many of those who would not sign cards stated that they would like to have a union, but they were afraid to sign. Based on this, it was absolutely clear to me that the majority of the people wanted a union at Crane Resistoflex.

We made no secret of our campaign, and well before we filed with NLRB our petition, the company launched a tremendous campaign against us, or against the union, if you will, the organization.

First, the company set up weekly small group meetings on every shift, and we were required to attend. At these meetings, for the first time, supervisors asked us for suggestions on safety and productivity. They also told us that these meetings were to show us that they cared about us and that we therefore did not need a union, and that the company would do anything to keep a union out of the plant.

The company also held mass meetings where we were required to listen to anti-union speeches and watch anti-union films.

None of these meetings seemed to have very much effect on the workers, and people continued to talk in favor of the union and pass out union literature, wear union buttons, and put union bumper stickers on their cars. I would estimate during the company's anti-union campaign, 90 percent of the people on my shift, the evening shift, made it clear they still supported the union.

What did affect the workers were company statements that implied that if we unionized, the company might cut production or even move the plant. We knew that the plant they closed in New Jersey was unionized, and the supervisors openly told us that the main reason they moved from New Jersey was to get away from the union. They also told us that they had a plant in North Carolina that could be used to do the work that we did if that became necessary.

Finally, in response to the complaints about the fact that we were regularly working 10 and 12 hours a day, we were told that although there was enough work to justify establishing a third shift, the company would not decide on whether to expand the work force until after the election. The message was clear to the employees and to me, that the company was threatening to cut production of we voted the union in.

I believe that these threats were not enough to intimidate the people out of their support for the union. They still felt the same way. But the final blow was a speech given the day before the NLRB election.

On that day, we all had to come in early for a speech given by Crane's president, who had never spoken at the plant before. He was flown in in the morning from St. Louis especially to give this speech.

The speech was passionately against the union. But one part stood out like nothing else in the months of anti-union speeches that we had to listen to. He said that if the company ever had to bargain with the Steelworkers, our current benefits would be up for grabs.

He held up a booklet that the company puts out describing all of our benefits and insurance programs and what-have-you. He said, "I believe you are familiar with this—health insurance, life insurance, IRA, sick leave. We will all be starting over again." As he said this, he tore up the booklet and threw away the pieces. He then said, "Believe me, that is going to be the case. That is not a threat. I am not here to threaten. I just want you to understand the facts."

Senator **Metzenbaum**. When is a threat not a threat?

Mr. **Medows**. That is just the way he said it. I had an opportunity to record the whole speech.

It was clear to everyone that he was telling us that if we voted for the union, the company would make sure that we would lose our benefits. After the speech, people asked me if the company could take our insurance away from them like that. Most of them seemed scared and shocked. They really did not know what to expect.

In the election the next day, the union lost two-to-one. I have no doubt that this threat affected people's votes, and because of fear, changed the outcome of the election. My understanding is that the NLRB told us that the speech was not illegal, but it seems wrong to allow a company to make workers afraid that if they vote for a union, their families will lose their insurance benefits, and they could even lose their jobs.

A large number of Crane workers since the vote have told me that they are now sorry they voted against the union and that they voted that way because they were afraid. There is something wrong with a law that says workers have the right to form unions and then also allows employers to put them and their families in fear of their insurance benefits and their jobs.

Senator **Metzenbaum**. Thank you very much, Mr. Medows. I appreciate your willingness to come up and testify before us. I would say the same thing to that company. I hope they would not contemplate taking any counteraction against you for your coming before a committee of Congress to testify.

Mr. Kodluboy?

Mr. **Kodluboy**. Good morning, Senator.

Senator **Metzenbaum**. Good morning.

Mr. **Kodluboy**. My name is Michael Kodluboy, and for the past three years, I have been an organizer for the United Steelworkers of America, working throughout Minnesota.

Today I would like to tell the Committee of an unsuccessful union organizing campaign involving the Dotronix Company, which manufactures VDT terminals in Elk River, Minnesota.

I believe that this campaign gives a vivid illustration of how the National Labor Relations Act can at times operate cruelly to deny workers their right to organize unions rather than to protect that right.

In July 1986, I was approached by a group of employees from Dotronix' plant in Elk River, Minnesota, which is Dotronix' only assembly line. The workers complained of favoritism in assignments and discipline, compulsory overtime, and low wages. They were paid around $4 per hour. Soon after I met with a small group of employees, they went out and organized a committee of 22 pro-union employees. This was one-fourth of the plant, and they accomplished this in a few short weeks and before any union cards had been signed or distributed.

By the time we filed an NLRB petition at the end of the summer, more than 60 percent of the plant had signed cards calling for recognition of the union. The company refused to voluntarily recognize the union and called for an NLRB hearing and election. It is not an understatement to say that the Elk River employees were simply shocked with what then happened.

At the hearing, the company argued that all of its employees, regardless of where they worked, should be in the same bargaining unit and able to vote in the election. Specifically, this would include its employees in its engineering department and prototype assembly operation, which are attached to its headquarters in New Brighton, Minnesota, some 35 miles away, and employees at its warehouse in Blaine, Minnesota, some 30 miles away. The NLRB accepted the employer's position.

It is important to understand that none of the Elk River employees had ever worked at other places or performed the same jobs as the other employees. Indeed, none of the Elk River employees even knew of the other employees. There was virtually no contact between the different groups of workers, and there certainly had been no efforts to organize a union at New Brighton or Blaine.

The employees at Elk River were thus being told in effect that if they wanted to form a union, they had to persuade workers who they had never met and who worked 30 or more miles away, doing different types of work, to join them.

Our surprise at the company's argument and its acceptance by the NLRB was nothing, however, compared to our surprise at what we found when we went to the other plants to try to talk to their employees. We discovered that as soon as the company learned of the Elk River employees' organizing efforts, it began anti-union campaigns at New Brighton and Blaine.

Since we had not yet had any contact with these plants, we have no idea what was said to the employees; but by the time we first went there, they had been made to be terrified of us. They literally refused to take our literature, to speak with us, or to have any contact with us at all, for fear of being seen with us.

Indeed, when we tried to talk to them, they told us that we could get them fired and that we should go away. The only contact we ever had with a New Brighton or Blaine employee was one phone call we received from a worker who refused to give his name. He told us that he wanted to read our literature, but he was afraid to be seen or have any contact with us. He asked us to drop a packet of materials late at night at a specified address. We did that, and found that the address was a dark, seemingly vacant house. We left the materials, as instructed, in front of the house.

Given what was happening in New Brighton and Blaine, it was not surprising to us that we lost the election, nor was it surprising that the Elk River employees who wanted a union became disillusioned and began quitting their jobs, believing that there was no real chance of improving their jobs through unionization. These employees had wanted a union because of their anger with the way in which they were treated, and the NLRB election process seemed to make a mockery of their efforts.

Two points about this campaign illustrate how the NLRB election process has become a way of frustrating rather than enhancing workers' rights to unionize.

First, by requiring that the Elk River workers, if they wanted a union, must join with those who were in distant plants and with whom they had had no contact, the law ignored the practical realities of the workers in question.

Second and more important, it shows how employers are willing and able to use the Act's technicalities to deny workers their rights. Here, the company used the election process as a way of terrorizing one group of workers who had not yet been informed of their rights and knew no better, and then they used these intimidated workers to defeat unionization at its other plant.

When the system works this way, it is not surprising that workers lose faith in the ability of the law to deliver on its promises.

Thank you, Senator.

Senator METZENBAUM. Thank you very much for a good statement, Mr. Kodluboy.

Our next witness is Professor William Dickens, from the Department of Economics, University of California at Berkeley, California.

Professor DICKENS. Mr. Chairman, as you noted in your opening remarks, it is the intent of the National Labor Relations Act to protect employees' rights to organize to bargain collectively with their employers.

For its first 20 years, it did this successfully, and the institution of collective bargaining flourished. However, increasingly over the last two or three decades, firms have devoted substantial resources to resisting employers' efforts to organize. This is the conclusion of several studies of corporate personnel policies and can be seen in the phenomenal increase in the systematic use of legal and illegal practices to prevent unionization.

Given these changes in management's ability and will to resist, the NLRA no longer does the job it was designed to do. Today, I would like to discuss three reasons why the Act is no longer effective in protecting employees' rights to organize.

First, the law gives firms unequal access to workers during organizing drives. Representatives of the firms speak with employees throughout the working day. Supporters of the union must make their case before or after work or during breaks.

Union supporters are limited as to when and where they can circulate written material; the company is not.

Perhaps most important, companies hold captive-audience meetings all workers must attend. Union organizing meetings can only be held after work, oftentimes far from workers' homes.

This unequal access makes it hard for union supporters to make their case and counter company claims. In some elections, many workers will have had almost no exposure to arguments for unionization.

The importance of this in shifting the balance in companies' favor is illustrated by a study of mine which found that the fraction of elections in which employee organizing could be expected to succeed was reduced by 40 to 50 percentage points when companies made full use of their advantage in communicating with workers.

This was without any illegal campaign practices. Many other studies corroborate this finding.

Employees depend on their firms for the food on their table and the roof over their heads. If they believe that supporting a union may cause them to lose their job, or just make it difficult to obtain promotion or desirable work assignments, they can be discouraged from supporting the union. If they doubt the union's ability to protect them from company retaliation, they will often feel forced to vote against the union.

This is the second way in which the NLRA fails to protect employees' rights to organize. There are many ways for a firm to get across to its employees that their jobs may be in jeopardy. Some are illegal, and some are legal. And you have heard some examples of both this morning.

By definition, it is difficult to identify and quantify cases of implicit threats and intimidation, but one study addresses the importance of these considerations. It was conducted by a student of mine under my direction and found that employees attempting to organize clerical workers were 15 to 60 percentage points less likely to succeed when it would be easy for the employer to relocate their jobs if the union won, as compared to cases where it would not be easy to relocate the jobs.

The law fails to protect workers against implied threats; it is also ineffective in protecting them against direct threats and intimidation. This is the third problem I wish to discuss.

Threatening workers, promising benefits if they do not organize, firing union supporters, all these practices are illegal. Still, they have been occurring with greatly increasing frequency.

Between 1960 and 1980, NLRB findings of unfair labor practices rose 400 percent. Reinstatements of fired workers rose 500 percent. The reason that this increase is taking place is that the tactics are effective in blocking organizing and penalties to prevent them are inadequate. Such practices occur more frequently when a firm has the assistance of an attorney or an anti-union consultant in carrying out its campaigns.

Senator METZENBAUM. Are there some attorneys and consultants who specialize in "breaking" union organizing activities?

Professor DICKENS. Yes, there are.

Senator METZENBAUM. And do they travel around the country, making their services available?

Professor Dickens. They do indeed. I have noted in studying election campaigns in different parts of the country that I will see the exact same handout with a different company letterhead at the top of it in different places. Obviously, it is because the firm that is consulting with the company in creating its anti-union campaign has boilerplate material that they run off in each campaign.

Senator METZENBAUM. Professor Dickens, has the ability of employees to choose a union gone down in proportion to the right of the employer to make his or her statement to the employees and to use such tactics as you have described and have been described by the other witnesses? Has there been a correlation that as those employer activities were permitted to increase by the National Labor Relations Board, you had this decline in the effectiveness of organizing campaigns?

Professor DICKENS. That is certainly the conclusion of several studies of the phenomenon. Whether it is the increase in the rights of employers, or whether it is the increase in the will of the employers and their understanding of how to apply certain techniques as well as the Board's willingness to let them use them, it is hard to say how much is which. But there certainly are a number of studies which would indicate that as management has become more sophisticated in its resistance of unionization, certainly, the success of union organizing drives, the extent of union organizing has fallen off, and it is possible also to relate these things to the decline in the percent of the work force that has been organized by unions.

Senator METZENBAUM. Let me ask you a question. Do you feel that management and labor are presently on a fair playing field in connection with the right to organize and to choose a representative on a free and open basis?

Professor DICKENS. If I had to summarize my comments in one sentence this morning, I would say "No" to that question; exactly.

Senator METZENBAUM. Let me just ask you one other question. You are a professor of economics at the University of California. Are you a paid consultant, or do you have any ties with union, labor or management?

Professor DICKENS. The only paid consulting I have ever done is as an expert witness on economic issues and sex and race discrimination. Outside of that, all of my research to the extent that it is funded by anyone besides the University of California is the National Science Foundation.

And currently, in areas totally unrelated to this, I do have a grant from the Small Business Administration. [Laughter.]

Senator METZENBAUM. I will not have any comments from the rear of the room. If you want to enjoy yourself, laughing, singing, dancing, please leave the room.

I asked you that question because I want to make certain that your testimony is objective, and that is what I was making an inquiry about. If I understand what you are saying, you have no ties whatsoever either with management or labor, and the grant from the Small Business Administration is part of the Reagan Administration. Is that the one you are talking about?

Professor DICKENS. Yes.

Senator METZENBAUM. Okay. Thank you very much. Proceed.

Professor DICKENS. My own estimates of the effects of illegal campaign practices suggest again that organizing efforts are successful in 20 to 30 percent fewer elections than they would be when companies make full use of such illegal tactics. So they are effective in preventing organization.

What is the overall significance of this increase in management resistance?

In the early 1950s, about 35 percent of the private non-agricultural work force were members of unions. Today, less than 15 percent are. Certainly, management resistance is not the only cause of the decline, but it is an important one. I do not have the time today to summarize the many studies of union decline to describe how I reached this conclusion, but two pieces of evidence are quite telling.

While U.S. private sector unionism has been declining, public sector unionism has been booming. Despite sharing similar economic conditions with the United States, private sector unions in Canada have been growing during this same period.

Nearly every explanation of the decline in U.S. unionism is inconsistent with these facts, except the one that says U.S. private sector employers have successfully resisted unions while public sector and Canadian employers have not because of their different legal and political environments.

Mr. Chairman, I would like to thank you for the opportunity to testify in these very important hearings.

Senator METZENBAUM. Thank you very much. Your testimony is very helpful.

[The prepared statement of Professor Dickens follows:]

Testimony of Professor William T. Dickens Before the Labor Sub-Committee of the Senate Committee, on Labor and Human Resources January 29, 1988

Does the NLRA Still Protect Workers' Right to Organize?

It is the stated policy of the U.S. government "...[to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment..." (Section 1, National Labor Relations Act). After the passage of the NLRA workers exercised these rights in record numbers and the fraction of the workforce organized into unions grew substantially. However, for the past three decades this faction has been falling. Does the NLRA still serve to protect workers' right to organize? It is my belief that it does not.

First, the law gives the firm far more access to workers and thus more opportunity to make its side of the case during organizing campaigns. Since the volume of company communications in a union representation election can be shown to have a significant effect on its outcome, differential access gives the firm a significant advantage in certification elections. Further, employees who depend on the firm for their livelihood can be easily coerced by implied threats of unequal treatment or job loss for union supporters. These are practices which are legal under current interpretations of the NLRA that allow firms to intimidate workers into giving up their right to bargain collectively. Finally, many practices prohibited by the NLRA which reduce the probability of union success in representation elections are commonly pursued by management in systematic anti-union campaigns. The penalties prescribed by the act are inadequate to deter this behavior.

Taken together, these considerations may explain the large effects increasing management resistance to union organizing apppears to have had on the outcome of certification elections and perhaps on the level of unionization in the United States. I turn now to the detailed development of these arguments.

I. Unequal Access.

Both workers attempting to organize a union and companies trying to stop them rely on three methods to get their message across; written communications, person-to-person conversations, and group meetings. For all three methods the law affords the company a significantly greater opportunity to reach workers and make its case.

The company can distribute written communications to its workers any time and any place. Companies can and do distribute material during working hours. It is possible for a company to make a written response to a union communication in a matter of hours. Workers trying to organize a union have no such opportunity. Companies nearly always place restrictions on the time and place in which workers may distribute literature. Company representatives speak with workers anytime they want. They have nearly unlimited access to all workers throughout the working day. Union supporters may only speak with other workers during breaks and before and after work. Union organizers are limited to times before and after work and must rely on talking to workers coming to or leaving work or must travel to workers' homes.

Finally, and perhaps most important, the companies hold meetings during working hours at the work site which all workers must attend. If the union wishes to hold a meeting it can only be before or after work, usually at a union hall located some distance from the work place and peoples homes. Obviously the turn out for such meetings will be less than for a company "captive audience" meeting.

The unequal access the company has to workers makes it hard for union supporters to make their case and easy for the company to undermine the union's arguments since many workers may not be exposed to union responses to company charges. This problem can be exacerbated if the company combines an aggressive campaign of communicating its message with harassment and discharge of union supporters making it even more difficult for those workers who support the union to reach others with their message.

The potential importance of this disproportionate access is demonstrated by my reanalysis of the Getman et. al. (1976) data (Dickens 1980 & 1983). In that study I found that the volume of the company anti-union campaign--the number of written communications and the number of captive audience meetings--significantly reduced the likelihood of union success. In particular, the estimated difference between a low volume campaign and a high volume campaign was a 40 to 50 percentage point smaller probability of a union victory. Many other studies of the effects of company campaigns corroborate this result.[1] The inability of worker organizing committees to match the effectiveness of the company campaign is certainly a handicap.

II. Legal Intimidation of Workers

Employees depend on their firms for their livelihood. If they believe that supporting a union may cause them to lose their job, or make it difficult to obtain promotion or desirable work assignments, they may be discouraged from supporting the union and may even vote against the union if they doubt the ability of the union to protect them from company retaliation. It is illegal for the firm to make overt threats against employees, but there are many ways--both legal and illegal--for the company to get across to workers that their jobs may be in jeopardy.

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[1]. See Freeman and Medoff (1984, p234) for a partial list.

While it is possible to identify situations where firms make overt threats against workers it is obviously much more difficult to identify situations where more subtle forms of intimidation have been used. However, one study has attempted to examine the importance of one type of intimidation.

Although the law prohibits firms from moving to avoid unionization there are many loopholes and firms often move or close down their operations after a union victory. In the course of a research project on the organizing of clerical workers a student of mine came across 22 cases of offices being closed or relocated in the San Francisco area in response to union organizing during a ten year period. This was far from an exhaustive list (Freiberg and Dickens 1986).

The law prohibits firms from explicitly threatening to move in anti-union campaigns, but it is easy for them to make workers believe that they intend to move without making explicit statements to that effect. A firm can cite examples of other firms which were "forced to move or shut down because of unions" or can claim that it is in poor financial condition and might have to "reconsider its commitment to produce goods at this plant if a union were to succeed in increasing wages." The firm need not make such statements but might simply plant rumors to the effect that a union victory will lead to a plant shutdown. In an environment in which run-away shops are common the company may not have to do anything for workers to conclude that their employer might move if they organize.

A study conducted by a student under my direction strongly suggests that many workers--at least many clerical workers--may be voting against union representation not because they don't desire that representation, but because they fear losing their jobs. In our study (Freiberg and Dickens 1986) we found that in clerical units which were judged to be easy to relocate the probability of an organizing drive succeding was 15 to 60 percentage points lower. There were no NLRB findings of explicit threats in any of these elections. This result was robust to controls for a number of election background characteristics and to controls for the extent of management anti-union campaign efforts.

III. Illegal Campaign Practices.

It seems reasonable to assume that overt threats to fire workers or close a plant if a union is formed, or actions by a firm to increase workers' wages or improve working conditions in the face of an organizing drive are likely to reduce a unions chance of winning a representation election. It seems particularly likely that firing or threatening to fire union supporters would make workers less willing to work for a union and decrease the chance of a union victory. While one can imagine situations where any of these tactics might backfire, the supposition that they would work against the union is the reason why the law prohibits them. If we were to abandon this reasonable presupposition we should first require that there be strong evidence presented against it. This evidence could take one of two forms--a study showing that there were statistically significant positive effects of such practices on the probability of a union victory or, failing that, a study which showed that one could rule out the conclusion that the effects were substantially negative. No such evidence has ever been presented[2]. Instead the seven studies which have been done on this topic all find either significant negative effects of illegal practices or present estimates of the effects which are too imprecise to rule out either large effects or no effect at all.[3]

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[2] In one study the authors report that one illegal campaign practice is positively and significantly related to union support (Lawler and West 1985). However, as the authors note (p418) the result does not obtain when the data are not weighted by the size of the election. This suggests that the reported result is due to the unusual outcome of an election in one or a few large companies. As I have argued elsewhere (Dickens 1985) unweighted estimates are generally to be preferred. In a study by Cooper (1984) she finds a significant positive effect on the decline in union support from the card signing drive to the election in "close elections." It is inapproprite from the perspective of statistical theory to restrict

Even in a well functioning labor relations system a certain number of illegal practices could be expected to be committed. Uninformed employers could mistakenly interrogate employees or unintentionally make false statements. A supervisor could in the heat of an argument threaten a union supporter. In this case we would expect to see the level of unfair labor practices committed by firms remain proportionate to the level of organizing activity. Nothing could be further from our recent experience. While the level of union organizing has remained relatively constant or even fallen off, the number of unfair labor practices committed by firms has soared. Between 1960 and 1980 NLRB findings of company unfair labor practices rose by more than 400% and the number of workers ordered reinstated by the NLRB due to illegal firings rose by more than 500% (Freeman and Medoff 1984 p232).

Although some of these acts are mistakes on the part of firms, there is evidence that illegal practices are often part of a deliberate anti-union campaign. Cooper (1984) reports that in her sample of elections NLRB findings of 8(a)(1) violations (coercion) were twice as likely when the company was represented by a consultant as when the company handled the election with its own personnel. Further, 8(a)(3) violations (employment discrimination against union supporters--most frequently discharges)--were nearly twice as likely when the firm was represented

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the sample of elections studied on the basis of the realization of the random variable under study and the result should be ignored. Further, a study addressing the same question as Cooper with better data reaches the opposite conclusion. A detailed discussion of this can be found in the appendix

[3]. A detailed examination of these seven studies is contained in the Appendix.

by an attorney, and more than twice as likely when the firm was represented by a consultant, than when the firm handled the election with its own staff. In another study (Dickens and Franzblau) a student of mine and I found that looking across different states at different times the number of labor lawyers listed in the American Bar Association's directory divided by a state's population was positively associated with the frequency of NLRB findings of illegal employer campaign practices as well as the frequency of use of a number of legal campaign tactics such as election delays.

Although no attorneys or consultants I have talked with have ever admitted advising their clients to break the law some have told me that they feel obliged to explain the law and the extent of the penalties for breaking the law to their clients. Given the insignificance of the penalties it is easy to see why many employers may choose to break the law. Even if they fail to prevent unionization, if they can delay it with some significant probability the expected gains from postponed wage increases can easily out weigh the costs of reinstating workers with limited back pay.

To conclude, due to the insignificant penalties for violation of the law, we have seen a huge increase in the systematic use of illegal anti-union campaign tactics to deprive workers of their right to organize for collective bargaining. The best estimates of the effects of these practices indicate that they are often effective in preventing unionization.

IV. Management Resistance and the Decline of Union Membership

The fraction of the workforce belonging to unions peaked in the U.S. in the late 1940s and early 1950s with about 35% of the private non-agricultural workforce unionized. Today that fraction is almost certainly less than 15%.[4] A number of explanations have been proposed for this precipitous drop--the decline of the importance of manufacturing and blue collar employment where union membership has traditionally been concentrated, the decline in union organizing efforts, changing worker attitudes toward unions, increasing union wages in an increasingly competitive environment leading to job losses for union workers, the proliferation of government welfare and protective legislation which addresses many of the same needs that unions do, and increasing management resistance to union organizing efforts. Certainly all of these factors have played a role in the changes we have seen. Many of the factors are interrelated. I do not believe, and do not want to argue, that increasing management resistance is the only cause of the problems unions are having, but it is an important cause.

A complete review of all the studies of the reasons for the decline of union membership is beyond the scope of my testimony, but there are two pieces of suggestive evidence. The Canadian economy has been undergoing much the same changes in the make-up of its workforce, but while the fraction of the U.S. workforce which is organized has been shrinking, the fraction in Canada has been growing. Also, at least some Canadian unions have been even more successful than their U.S. counterparts in raising wages. It is true that workers' attitudes toward unions have been changing for the worse--so have peoples' attitudes towards business, government and religious institutions. It has also been suggested that people see unions as less necessary because of the increase in government welfare and protective programs. But if these changes are to explain the problems private sector unions have been having, what explains the tremendous growth in public .

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[4]. The most recent figure is from the Current Population Survey. The derivation of the earlier figure is described in Dickens and Leonard (1985).

sector unionism during this same time period? One thing Canadian and public sector unions have in common is that they face employers who are less likely to attempt to intimidate workers out of voting union. In Canada the system for certifying unions gives the employer little opportunity to do this.[5] Public sector employers are not going to go out of business or move to a different location if a union is formed. They also seem to be less likely to harass or discharge union organizers. It seems possible that these differences in the extent of management resistance to union organizing may explain a good deal of the difference in union success. Less organizing effort on the part of unions may also explain some of this decline, but the decline in organizing may be due at least in part to the increased difficulty of union success.

If increasing management resistance explains a significant fraction of the decline in the success of union organizing in the private sector why is it took twenty years after the passage of the NLRA before we began to see the increase and what explains the exceleration of the increease in recent years? Several explanations have been given for this. It has been argued that it has taken time for management to learn how to resist union organizing efforts. It has also been argued that the change is due to a new generation of managers who have put an increasing emphasis on union avoidance (Kochan et.al. 1986). Another explanation lays the blame on the NLRB and the courts' changing interpretation of the NLRA. Alternatively, despite the shrinking fraction of the workforce organized, unions have been increasingly successful in winning wage gains for their workers. Even with the widely publicized "concession bargains" of the recent past the union/nonunion wage differential has been rising throughout the 70s and early 80s. These rising wages in the face of increasing competition from foreign firms and deregulation in some industries may help explain the increase in company anti-union efforts.

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[5]. See Weiler (1983) for a description of the Canadian system.

V. Conclusion

The last thirty years have seen a large drop in the success of employee efforts to form unions and in the fraction of workers represented by unions. It is hard to say precisely how much of this drop is due to increases in management resistance to union organizing, but the amount is certainly substantial. Management's success, in turn, comes to a significant extent because of their ability to use both legal and illegal means to intimidate workers and because the law makes it easier for them to make their case to workers and to answer union arguments. Given these circumstances the Senate may wish to consider changes to the law.

There are two different approaches that might be taken to this problem. The first would be to significantly increase the penalties for violations of the NLRA and to broaden the definition of what constitutes an unfair labor practice to include intimidating innuendos and suggestions. It would probably also be necessary to find some vehicle by which unions could be given more equal access to workers. Such an approach would have many drawbacks. It would require the development and enforcement of guidelines for distinguishing intimidating speech, the employer who accidentally blunders into the commission of an unfair labor practice would be severely penalized, and it is possible that the resources allocated to enforcing the act would have to be increased.

An alternative is that proposed by Professor Weiler of the Harvard Law School (Weiler, 1983). If an election could be carried out nearly immediately after the union presents the board with the required authorization cards there need be no increase in the penalties for violating the law -- the company would have almost no opportunity to commit a violation. Union organizers would still have to be protected during the card signing drive, but since this could be restricted to a relatively short period of time it would not be unrealistic to require a company to show that there was reasonable cause to an NLRB administrative law judge before firing a worker who signed a card during an organizing drive. After the cards were presented to the NLRB the company might be given a few days to prepare its case. A meeting could then be held for all workers at which both company and union representatives would be allowed to speak. A day later the election would be held. The company could be allowed to communicate with workers during earlier phases of the drive as well. When they do the union should be given equal time and access.

In addition to either of the above proposals it may also be necessary to deal with the problem of unions' inability to obtain first contracts and to maintain bargaining relations. Additional restrictions on firms' ability to relocate work after a union victory may be required to satisfy the intent of the NLRA in the 1980s and beyond.

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Appendix

Do Illegal Practices Affect the Outcome of Union Certification Elections? An Examination of the Evidence

There are seven studies of the effects of illegal practices of which I am aware. Three studies (Aspin 1966, Catler 1978, GAO 1982) Take the same basic approach to the problem--they compare the outcome of elections in which there were NLRB findings of unfair labor practices committed by the company with those in which there was no board finding of illegal company practices. All three studies find that a union victory was significantly less likely when illegal campaign practices were found.[6] However, there are three problems interpreting the results of these studies. First, they contain no controls for the extent of legal company campaign efforts in these elections. If legal campaigning is more intense on average in elections in which unfair labor practices take place then the effects of illegal tactics will be biased upward.[7] Second, they contain no controls for the initial level of employee sentiment in an election. If firms are more likely to commit an illegal practice when they are losing badly this will bias against a finding of significant effects for illegal practices. Finally, they rely on NLRB findings of illegal practices to identify elections in which the law has been violated. Before there can be an NLRB finding of a company violation the union or a group of workers must file a complaint and see it through the board's hearings. This may happen in only a small fraction of the cases in which an unfair labor practice takes place. Getman, Goldberg and Herman's (1976) analysis (using an off-duty NLRB administrative law judge to evaluate the evidence they collected) found unfair labor practices in 22 of the 33 elections they studied.[8] However, there were NLRB findings of unfair practices in only three of the elections. This disparity between reported and actual violations could cause these studies to overestimate the effects of illegal campaign practices if they were more likely to be reported in cases where unions lost, or to be underestimated if nonreporting is random or if unions do not press complaints when they lose badly.

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[6]. Aspin (1966) finds that illegal discharges backfire on average when an employee is reinstated by the board before the election takes place. However, this is a very infrequent occurrence.

[7]. There is some evidence of this in the Getman, Goldberg and Herman (1976) data. The average number of captive audience speeches given was about 7% higher in elections in which illegal practices were committed and the number of company written communications was about 18% higher. Further, a study by Dickens and Franzblau finds that in a cross-state-cross-time U.S. data base the frequency of NLRB findings of illegal campaign practices is positively correlated with the frequency of a number of legal tactics (such as delays) and the ratio of labor lawyers in the state to the workforce.

The study by Lawler and West (1985) is a slight improvement over these other studies in that they have information on whether illegal practices have taken place even in cases where no complaint was filed by the union. They also control for many legal aspects of company campaigns. They still do not have a measure of employee pre-disposition and since union organizers' assessments (their source of information on the company actions in each campaign) may be biased by the outcomes of the elections the study is far from perfect. The results are also a mixed bag with the authors finding significant negative effects for some campaign practices but not for others.[9]

To summarize, these four studies certainly provide no evidence against the presupposition that illegal campaign practices reduce the likelihood of union success. If they tell us anything, they provide weak evidence in support of the presupposition. However, authors of two of the remaining studies claim that their work provides evidence against the view that illegal campaign practices reduce chances of union victory.

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[8]. Data provided to me by the authors.

[9]. See footnote 1.

Professor Laura Cooper has conducted a study of a number of certification elections taking place in NLRB region 18 (Northern Midwest). She collected information on the number of authorization cards turned in by organizers to the NLRB and used this as a control for employee predispostion. She concluded from her study that there is no evidence that illegal campaign practices affect election outcomes. This is a reasonable conclusion considering only the results of her study, but given the results of other studies and the inappropriateness of the design of her study for addressing this question her evidence is weak to non-existent.

Cooper performs two different types of analysis. In the first she compares the success rate in elections with and without NLRB findings of illegal practices and finds that while success is 5 percentage points less likely in elections with a finding of illegal practices the effect is not statistically significant given her sample size. However, this study is identical in method to several of the studies cited above, all of which have sufficiently large samples to reject the hypothesis of no effect. Combining the studies the conclusion is inescapable -- unions win less frequently in elections in which the NLRB finds illegal campaign practices.

Her second method of analyzing the question is to compare the fraction of workers signing authorization cards with the fraction voting union in elections in which the NLRB finds that illegal practices have taken place with those in which there is no finding. Her results are that the fraction goes down in both types of elections, but it goes down by less in elections with findings of illegal practices.

The result is not statistically signficant[10]. Further, it is subject to two important criticisms. First, as with the previous studies, Cooper does not know all elections in which illegal campaign practices take place. As was noted above, the actual number may be seven times as great as the number of board findings. Second, as Cooper notes (p108), organizers frequently fail to turn in all the cards that they collect--particularly when they suspect that the company will run a vicious and perhaps illegal campaign. Both of these problems would bias Cooper's results away from finding significant negative effects for illegal practices. Getman et. al. (1976) perform a similar analysis which has neither of these two problems. They know all elections in which illegal practices took place[11] and they also know how many workers say they signed cards--not just how many the organizer turned in. They find that statistically significantly fewer card signers vote union in elections in which there are illegal campaign practices.

Despite this result Getman et. al. also conclude from their study that illegal campaign practices have no effect on the outcome of certification elections. They conducted a very careful study of 33 elections which took place in the Mid-West in the early 1970's. The data they collected allows analysis which avoids all three of the major problems with the other studies. Several measures of employee predisposition are available so that it is possible to control for this in the analysis of the effects of illegal practices. The data set also contains many measures of other aspects of union and company campaigns. Finally, Getman et. al. collected independent evidence on the existence of unfair labor practices in each election and submitted them to an off duty NLRB administrative law judge to determine in which elections breaches of the law had taken place.

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[10] When she restricts the comparison to "close elections" she finds that the difference is statistically significant. However, such a restriction is entirely inappropriate from a statistical standpoint. The election outcome is the random variable that is being studied. To select which elections to study on this variable guarantees that the results will be biased and invalidates any standard significance tests. The direction of the bias can not be judged without knowledge of the true distribution.

[11] See the discussion of this study below.

Their primary evidence in support of their conclusion that illegal practices have no effect on election outcomes is their table 5-3 (p115) which shows that while four categories of "potential union voters" are less likely to vote union in an election in which unfair campaign practices are committed, the extent (1-19 percentage points) is not statistically significant in three of the four categories.

Even if one accepts this analysis it hardly proves that campaigns have no effect. Just as they cannot reject the hypothesis that there are no effects of illegal practices they can not reject the hypothesis that the effects are twice as large as they measure them to be (a 2 to 38 percentage point reduction in union success depending on the group being studied). There are also good reasons not to take this evidence at face value.

There are four serious problems with the Getman et. al. analysis. First, although they collected data on many aspects of the company campaign and the election background they did not use this information in their analysis of illegal campaign practices. Second, they analyze only the behavior of people who are, or might be expected to be, pro-union or undecided at the time of the researchers' initial interviews with the workers. They leave out a large number of people who are anti-union early on, many of whom change their minds and vote for the union. Third, by looking at groups of "potential union supporters" individually they understate the statistical significance of the effects for all workers combined. Fourth, in the three cases where they fail to find statistically significant effects of illegal practices they are comparing the intent of workers at the time of the researches' initial interviews with them to how they voted. But in at least 12 of the 22 elections in which illegal campaign practices took place, some had already been committed before workers' intents were assessed! This obviously biases downward the estimated effects of the illegal practices.

In my reanalysis of the Getman et. al. data (Dickens 1980 & 1983) I avoid all four of these problems. I find that union success is statistically significantly less likely in elections with some types of illegal practices. The magnitude of the effect is to reduce the frequency of union success by 20 to 30 percentage points. Getman, Goldberg and Herman have responded to this study (Goldberg et. al. 1984). It is hard to distill an overall theme to their response so I will provide a point-by-point rejoinder.

On page 723 and 724 the authors claim that their failure to find statistical significance is not due to a small sample size. However, they seem to miss the point of this argument. As noted above, just as they can not reject the hypothesis of no effect of illegal campaigns for most of the groups they analyze neither can they reject that there are large effects. Whatever the size of the sample it is inadequate to establish the size of the effects of illegal campaign practices with sufficient precision to settle the substantive issue of whether the practices matter. In this sense their sample is too small.

On page 724 and 725 the authors note that they did not rely solely on the absence of statistical significance in reaching their conclusion. They also found that few workers reported illegal campaign practices as the reason why either they or other workers voted against the union, that employees were just as likely to report illegal campaign practices where they did not occur as where they did, and that originally prounion workers who switched to vote for the company were no more likely to report that they had perceived illegal campaign practices than those who remained loyal to the union. None of these results should be surprising. Who would like to admit that they were intimidated out of voting for a union? Someone who was certainly wouldn't want to admit it nor would they want to impute that motive to other anti-union voters. Better to see other workers as having the same good reason they had to vote against the union. This distortion in reporting can explain all of these results. In any case, my statistical analysis of their voting behavior seems to indicate that at least some workers were influenced.

On page 725 the authors also cite their finding that they could predict the outcome of most elections on the basis of workers pre-dispositions without reference to whether or not illegal practices were committed. However, they use the actual votes cast in their 33 elections, including those in which the illegal campaign practices took place, to estimate their model. My reanalysis of their data suggests that if they were to estimate their predictive model on a sample in which no illegal campaign practices had taken place and then to use that model to predict the outcome of the elections in their sample they would predict that the union would win several of the elections that they lost where illegal campaign tactics were found.

On page 727 the authors criticize my categorization of illegal campaign practice on the grounds that my category "threats and actions against pro-union employees," "has no legal significance since the Board does not attempt to distinguish between threats or acts of reprisal ... on the basis of whether they were directed against all employees or solely at pro-union employees." This may be true but this category has clear substantive significance and that was my reason for singling it out for special consideration. Contrary to the authors' claim (p727) this is not the only category of illegal campaign practices for which I found statistically significant effects. When I used the same categories they used in their study--

elections in which illegal campaign practice warranted a bargaining order vs. those requiring a lesser remedy--I again found the illegal practices to have a statistically significant negative effect on the probability that workers would vote for the union (see Dickens 1983 Tables 1&2).

In footnote 34 on p729 the authors argue that my failure to take account of the union campaign biases the results of my reanalysis. This is an important point and one I have dealt with at length in both my 1980 and 1983 papers. To begin with, any bias this introduces into my reanalysis of their data is also present in their study. In fact, one would expect the bias to be worse in their study since they also fail to control for many election background variables including the union involved in each election. However, the exclusion of the union campaign variable need not introduce any bias into the analysis of the effects of the company campaign if, as I argued, the company campaign is causally prior to the union campaign. My reason for excluding it is that it is definitely an endogenous variable and including it certainly would bias the estimates of the effects of the company campaign. Contrary to Goldberg et. al.'s claim, this is a well accepted statistical practice called the estimation of a reduced form model. This procedure is discussed in all Econometrics texts under the heading of estimation of systems of simultaneous equations (see for example J. Johnston Econometric Methods 3rd ed. p469). Further, the results that they present to show that the union campaign should be included in the analysis are entirely consistent with the assumptions behind the exclusion of the variable. If the union campaign is endogenous and affected by the company campaign it will be correlated both with the company campaign and with the outcome of the election. However, I concede the possibility that union campaigns are not causally prior to company campaigns and have worked out an analysis of the likely biases this would cause.

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This analysis was included as an appendix to my 1983 paper when it was sent to the referees for the *Industrial and Labor Relations Review*. It was cut by the editor from the published paper to save space however the analysis is discussed in the text, and footnote 31 (Dickens 1983) notes that it is available from the author. The conclusion of this analysis is that the most likely affect of ignoring the possible effects of the union campaign on the company campaign and the election is to bias downward my estimates of the effects of illegal campaign practices.

On page 730 the authors point out an error in the naming of my variables. While the overwhelming majority of the material in company campaign literature and speeches does not violate the law some of it in these elections did. As Goldberg et. al. suggest it is none the less inappropriate to refer to these as legal campaign practices and I have now adopted their terminology of referring to these variables as indicating the volume of the companies' campaigns. However, misnaming a variable does not invalidate the study as Goldberg et. al. seem to suggest. We should again consider what the consequences are if these volume variables are also to some extent measuring the effects of illegal campaign practices. What one would have to conclude is that the coefficients of my measures of the illegal campaign practices would then understate to the true effect since some of the effect of illegal practices would be picked up by these other variables.

On p731 the authors contend that since the results of the simulation using different parameter estimates are different the simulation results are unreliable. This has nothing to do with the simulations. Rather this is a result of the fact that the estimated effects of different campaign practices are somewhat different in different specifications of the voting model. The point of presenting different specifications is to present the reader with some feel for the range of possible results. By the standards of most statistical analysis these are fairly robust results.

The rest of the authors comments on the simulation analysis are a muddle of misunderstanding an misinterpretation. The results say what they say, and it is clear from the simulations and the results of the voting model that in an average election the estimated effects of illegal campaign practices are to significantly reduce the probability of workers voting for union representation.

Finally, at the bottom of page 730 and again on 732 Goldberg et. al. argue in conclusion that "...Dickens' reanalysis ... provides no support whatsoever for continued Board regulation, as there is little sense in incurring the costs of such regulation in order to have the Board ferret out illegal tactics that, by Dickens' calculation, matter far less than the volume and timing of employer campaigning...over which the Board has no control." This makes about as much sense as arguing that police should not expend resources tracking down murderers since car accidents kill so many more people, and police can't stop people from driving.

In conclusion, none of these studies provides convincing evidence against the presupposition on which the law prohibiting certain campaign practices is based. Further, the weight of existing empirical evidence clearly favors the view that illegal campaign practices reduce the likelihood of union success in certification elections. If the illegal campaign practices matter the Board must attempt to prevent them if workers' right to organize is to be secured.

Senator METZENBAUM. You have heard the testimony of these three witnesses. Do you think their testimony is typical of what goes on in many election campaigns?

Professor DICKENS. Certainly, there is not anything I have heard from these witnesses that I have not heard myself in talking to people who have taken part in elections in different parts of the country in the past.

The extent to which the tactics are used is something—well, let me answer that in two ways. My first-hand experience with these sorts of things goes back to about 1982-1983 when I was doing my original work on union organizing, 1980 when it began.

Back then, the extent of the practices that are being described in these cases would put these cases in the upper half of the most severe management resistance.

My understanding is that things have gotten worse; that management has become even more active in resisting unionization. However, I do not have the statistical evidence to back that up. I do not have the statistical evidence to back that up because the National Labor Relations Board has in the last several years become—well, I went down to the library yesterday before coming here in order to get some information to prepare in case you asked me a question like this. I found that the most recent issue of the National Labor Relations Board Annual Report is for the 1983 fiscal year.

I called the National Labor Relations Board this morning, and they assured me that the 1984 report would be coming out very shortly.

So it is very difficult for me at this time to tell you, as I can for how things changed between 1960 and 1980, exactly how things have happened since then. But my impression from talking with both management and union representatives is that the sorts of practices described here have become even more common since that time.

Senator METZENBAUM. Thank you very much, Professor Dickens. Your testimony has been very helpful, and we appreciate it.

I just have short questions to our other witnesses.

Mr. Kodluboy, do you believe the National Labor Relations Act protects employees' free choice during representation elections?

Mr. KODLUBOY. No, sir, Senator. I believe that the Act is being jiggled around and used by employers with impunity to terrorize and put into the minds of workers threats that they are going to lose their economic base if they should unionize. And the use of consultants, such as he has mentioned, is a common practice out there. They twist the law around.

Senator METZENBAUM. Let me ask you, Mr. Medows, whether you think that the laws protect the employees' right of free choice. In other words, do you think the employees at your plant have had a right of free choice, or do you think they have been pressured unfairly or unduly, either by management or by the union itself, based upon your experience in attempting to organize the plant?

Mr. MEDOWS. I feel they did not have a choice because they were intimidated by the company. I ran a clean campaign. I did not even allow them to put stickers up or anything like that. It was a nice, clean campaign. Yet the company chose to intimidate the employees into thinking that if they voted for the union, they would be putting their families' futures in jeopardy. That is what it boils down to.

Senator METZENBAUM. Mr. Harm, let me ask you, in the past you have been involved in three separate campaigns at Kawasaki; is that right?

Mr. HARM. That is correct, Senator.

Senator METZENBAUM. And do you feel that the company's activities have increased or kept pretty much the same in each of those campaigns? Could you comment on that?

Mr. HARM. Well, I think they have gotten progressively more aggressive and more flagrant in their violations of the law.

I think the consensus will generally state here that the problem is that they are not afraid to break the law; they have done it repeatedly. The cases are numerous, and there are a lot of cases where the law is broken where there is not enough evidence collected where you can get a case into court, or if it gets to court, it gets dismissed.

For example, a guy dumps over a barrel of paint, and he is a union supporter, and he gets fired for it. But they went to court, and he could not win.

The point is that, yes, they have been getting more aggressive, and when people feel intimidated—if you are coerced, you are coerced.

Senator METZENBAUM. When you say "break the law", I believe what you really mean is that they are not worried about the impact of the law, and their actions as interpreted by the NLRB and that the courts have indicated that they are not breaking the law? If they had broken the law, then they would be held in violation. But I think what you are saying is they have not been concerned about such actions they have taken and that they are not concerned that there will be enforcement by the NLRB by reason of the attitude of that body over the past eight or ten years.

Mr. HARM. Yes. If I can just continue that and surmise, it is not even the things that are illegal; it is the stuff that is perfectly legal for them to do that is restrictive in the ability to organize a plant. And the things that they do that are legal still have an intimidating effect on the person's free choice, and a very frightening and threatening effect on a person's livelihood.

Senator METZENBAUM. I understand your response, and I also understand that when you use the phrase "break the law", you use it as sort of your interpretation of it. But this really is not so because obviously, if they had broken the law they would be held in violation of the law, but the courts have concluded to the contrary, and I understand your choice of that language and I appreciate it very much.

I want to thank this panel very much for their participation.

Our next panel includes Maxine Hicks, from Windsor, Ohio; Robert Encinas, from Las Cruces, New Mexico; and Professor John Delaney, from the Graduate School of Business, Columbia University, New York.

We are happy to have each of the panelists with us.

Ms. Hicks, please proceed. You know the five-minute rule.

STATEMENTS OF MAXINE HICKS, WINDSOR, OH, ACCOMPANIED BY RICHARD KIRSCHNER, AFSCME; ROBERT ENCINAS, LAS CRUCES, NM; AND PROF. JOHN DELANEY, GRADUATE SCHOOL OF BUSINESS, COLUMBIA UNIVERSITY, NEW YORK, NY

Ms. HICKS. Good morning again, Senator Metzenbaum.

My name is Maxine Hicks. I have been an Ohio State employee for over 28 years. Presently, I am employed as an EEG specialist at the Cleveland Psychiatric Institute, a State institution. My job involves measuring the electrical impulses of the brain.

At this point, I would just like to say that I am very proud to be a State employee; listening to some of the testimony that some of the other witnesses had to render from the private sector, then being a public employee is not so bad after all—in Ohio. [Laughter.]

Senator METZENBAUM. I am also waiting for you to say you are proud to be a constituent of mine, Maxine.

Ms. HICKS. Right.

In April 1984, Ohio passed a collective bargaining bill for the State and local employees. Ohio State employees can now organize and negotiate a collective bargaining agreement with the State of Ohio over our wages, hours, terms and conditions of employment. An independent administrative agency was created. This agency determined our State bargaining units, conducted our State elections, and will rule on unfair labor practices. Also, this legislation provides us a way to resolve a breakdown in contract negotiations and even allows some employees the right to strike.

Prior to this legislation, our rights as State employees were very limited. Our economic survival was dependent upon the whims of the State legislature.

We would lobby extensively and often receive only a pittance for our annual increase. There were years in which we would receive only a five- or ten-cent per hour increase. Other years, we would be promised an increase only to read later in the newspaper that it had been denied by the State legislature.

Sometimes, we would not know that we were not going to receive the promised increase until we actually saw our paychecks.

Now, through contract negotiations, we have a say into how much our paychecks will be, and we can make the State keep its promises.

We also obtained the right to a fair hearing on our grievances with the State. Under the old State civil service system, the grievance procedure ended with a decision by the State Personnel Board of Review. This left the final determination of a grievance in the hands of the State, the employer.

We negotiated in our State contract a grievance procedure that ended in binding arbitration by a neutral party. So far, our experience with our negotiated grievance procedure has been very good. If we must go to arbitration, we can now present our case to a neutral third party and receive a fair and unbiased hearing.

Most importantly, State workers can now feel a sense of fairness at their work sites. We have rights, and through our unions, we can enforce our rights. We now work in a system in which the rules are applied fairly and equally. This has eliminated many of the arbitrary and discriminatory practices by management.

Now we can concentrate more on doing our work. In addition, my 28 years of service is now recognized and respected because strong seniority provisions were negotiated in the contract.

The legislation also helped to bring about a change in the attitude of management toward State employees. We became their equals at the bargaining table, and we had their respect away from the table.

There were labor-management meetings before the legislation, but now more problems are resolved during the labor-management meetings and do not become grievances. Also, more grievances are resolved at earlier steps.

I have been a union member for over 7 years and worked for the passage of a collective bargaining bill. Now, under the law, I have real and enforceable rights as a union member. Before the law, only 10,000 State employees in Ohio were represented by unions. Now, over 40,000 State employees are represented. That proves to me what I have always known—employees will join a union when they can have a real union with guaranteed rights.

Both the State of Ohio and the unions have played by the rules and negotiated in good faith. During negotiations with the State, we argued, we compromised, and finally we resolved our disputes without a strike and without disrupting State services or State facilities.

We are administering our contract in the same spirit of cooperation. We have seen in Ohio that workers, when given the opportunity of engaging in collective bargaining, free from coercion, will select a collective bargaining representative of their choice.

Thank you very much.

Senator METZENBAUM. Thank you, Ms. Hicks. Ms. Hicks, would you like to introduce the General Counsel for AFSCME, who is accompanying you?

Ms. HICKS. Yes. This is Richard Kirschner, General Counsel from AFSCME.

Senator METZENBAUM. We are very happy to have you with us, sir.

Our next witness is Mr. Robert Encinas, of New Mexico, also with AFSCME.

Mr. ENCINAS. Good morning, Senator.

Senator Metzenbaum, my name is Robert Encinas. I live in Las Cruces, New Mexico. I am a full time employee of the State of New Mexico. For the past ten years, I have worked as an equipment operator for the New Mexico State Highway and Transportation Department. My job involves the maintenance of heavy equipment and the construction and maintenance of State roads.

I am also the president of Local 2238 of the American Federation of State, County and Municipal Employees, AFL-CIO, and a Vice President of Council 18 of AFSCME.

Local 2238 consists of approximately 750 equipment operators, maintainers, custodial workers and engineer technicians.

Our local union was originally organized in 1974 in order to change the arbitrary and unfair employment practices that existed. For example, before the local was organized, we did not receive overtime pay for working overtime hours. Employees with legitimate complaints were simply told, "If you do not like it, you can leave."

Since 1974, at least until last year, Local 2238 had enjoyed a constructive working relationship with our employer. We had negotiated and operated under a series of collective bargaining agreements which assured employees of certain working conditions necessary to make our work environment both tolerable and safe.

In New Mexico, we have learned through bitter experience that without collective bargaining supported by strong laws, workers cannot hope to improve the conditions under which they work or make a better life for their children. In New Mexico, State workers face dual obstacles in our attempts to improve our living standards and our working conditions.

First, by law we are not permitted to enter into collective bargaining agreements over wages or other monetary matters. Therefore, we have never had any ability to raise our wages or benefits. Accordingly, our wages have remained among the lowest in the country. Indeed, 45 of the 49 States pay State employees higher wages than does New Mexico. The Albuquerque Tribune estimated that fully one-third of our State employees are eligible for some type of public assistance.

The second obstacle facing New Mexico State workers is of more recent origin. Beginning in 1987, even our traditional right to bargain over working condition issues has been effectively removed. In January of 1987, Hal Stratton became the Attorney General. Mr. Stratton was well-known to us in the past for his extreme and reactionary views of labor relations. During his tenure as Attorney General, Mr. Stratton has succeeded in abrogating our collective bargaining agreement and the collective bargaining process.

In June of 1987, Mr. Stratton held a press conference in which he announced that it was illegal for public employees to join a union and to work under a collective bargaining agreement.

Next, we learned that the Attorney General had issued a communication to the administration of the State Highway and Transportation Department, holding that our newly negotiated Local 2238 collective bargaining agreement was illegal.

Mr. Stratton also found the collective bargaining agreements of other locals to be illegal. On August 10th, Mr. Stratton issued a formal opinion finding collective bargaining of State employees to be illegal in New Mexico. In issuing this opinion, Mr. Stratton disregarded a recent Supreme Court decision confirming the legality of public employee collective bargaining.

Mr. Stratton has also sought to rescind public employee labor relations by embarking on a course to eliminate the New Mexico Rules of Labor-Management Relations. These Rules were promulgated by the State Personnel Board to establish guidelines for union elections, bargaining and other labor-management matters.

Finally, Mr. Stratton has issued an opinion holding that deductions from employees' paychecks for union dues are illegal. In making this finding, Mr. Stratton has singled out union dues from among 180 other types of paycheck deductions as being illegal.

Due to Mr. Stratton's actions, the employees who work for the New Mexico State Highway and Transportation Department have been without a collective bargaining agreement since June 1987.

We have lost much during these past eight months we have worked without our collective bargaining agreement. For example, we lost our ability to address safety concerns. The safety committee established in our contract is no longer permitted to operate. We no longer have the contractual right to refuse to drive unsafe vehicles. We must now pay for our own safety equipment.

For another example, we had worked hard to negotiate a catastrophic illness clause into our contract so that employees could use their own sick leave in order to care for seriously ill family members. This provision is no longer effective.

Perhaps most importantly, we have been deprived of a grievance procedure and labor-management meetings. We are therefore left with no way to have our complaints and problems addressed.

Time constraints prevent me from listing the many protections we lost, but there are several significant contractual benefits, rights and procedures that have been suspended.

Our local union and council have also been adversely affected by the Attorney General's actions. We had negotiated a dues checkoff clause in the contract that is not effective due to Mr. Stratton's efforts. Therefore, even though our members have voluntarily requested that dues moneys be deducted, the union does not receive the dues money from the State.

Furthermore, because the grievance provision of the contract has been taken from us, union stewards and other officers have no ability to respond to members' complaints. In addition, the union has not been able to communicate effectively with members.

The collective bargaining agreement gave us the right to post union notices if we provided bulletin boards. Traditionally, our local had utilized the bulletin boards to bring information to our members. Although we pay for the bulletin boards, every time we post a union notice on the bulletin boards, it is now ripped down by management.

Our experience in New Mexico confirms how important collective bargaining is to employees and that it is a necessity to have the right strongly protected by law. As of January 1987, we had made real gains in improving our working conditions through collective bargaining with our employer over a period of many years. We had a stable and constructive relationship with the management of the State Highway and Transportation Department.

Then, a single individual has been able to strip from us all the protections afforded by collective bargaining agreements and indeed, the right to bargain collectively itself. It has taken him less than a year to accomplish his goals. In a short time, the hard-won protections that had taken thousands of employees years to build are gone.

Without full collective bargaining rights, we will remain economically distressed and voiceless. We urge the Committee to give us, the American workers, the tools we need to organize and bargain with our employers. Without reasonable laws, hundreds of thousands of American workers will remain as economically disenfranchised as we are in New Mexico.

Thank you.

Senator **Metzenbaum**. Thank you very much, Mr. Encinas.

Professor Delaney, we are happy to have you with us, sir.

Before you commence, would you be good enough to tell us a little bit about yourself?

Professor **Delaney**. Yes, Senator. I am an Associate Professor at the Graduate School of Business, Columbia University in the City of New York.

I have a Ph.D. Degree from the University of Illinois at Urbana-Champaign, and my Ph.D. is in labor and industrial relations.

Senator **Metzenbaum**. Do you have any special financial relationship with either labor or management?

Professor **Delaney**. No, none at all, Senator. In fact, the research I have conducted that has not been funded by either Columbia University or the University of Illinois has been funded through grants from the Department of Justice and the Department of Labor. I have not received any money from any other organization.

Senator **Metzenbaum**. Thank you very much. Please proceed. I just wanted to ask you and the other professor that question in order that your bona fides are absolutely certain and clear.

Professor **Delaney**. I understand. Thank you.

We have had about a quarter century of experience with modern public sector collective bargaining and unionism in the United States. That experience has been the subject of literally hundreds of studies by researchers.

I would like to suggest some observations from that research on public sector unionism and collective bargaining that may be relevant to these hearings. I believe that the research is particularly relevant because collective bargaining laws play a particularly prominent role in the public sector, even more prominent than the role the NLRA plays in the private sector.

This is because there are tremendous differences across the States in the nature of the collective bargaining laws that exist. Those differences have had great effects on various outcomes, such as the level of unionization among employees, as well as the substantive bargaining outcomes that employees are able to negotiate.

In addition, from an academic perspective, those differences make the public sector an excellent laboratory for the study of the impact of the law on various public sector outcomes.

One of the most remarkable aspects of U.S. unionism is that the public sector has become much more heavily unionized than the private sector in a relatively short period of time. In my written testimony, I have included a figure and a table describing unionizational trends. If you look at that information, you see that in 1960 the private sector unionization rate was approximately triple the rate in the public sector. By the early to mid-1980s, however, the public sector unionization rate had become double the rate in the private sector.

Today, more than one-third of government workers are union members, and about 45 percent of public employees are covered by collective bargaining agreements. These numbers, however, mask the diversity of public sector unionism.

My research on professional police departments helps to illustrate this diversity. In a study that was conducted for the Department of Justice, my colleagues and I examined police departments in U.S. cities that had over 25,000 inhabitants sometime between 1970 and 1980. We found that a very large proportion of police officers belonged to unions and bargained collectively in States where they were covered by collective bargaining laws. The table in my written testimony attests to this very well.

In contrast, there were very few unionized police officers in cities that were in States without collective bargaining laws. Other research has suggested that this pattern of unionization is similar for other public sector occupations. When employees are granted the right to bargain under a protective State law, they tend to bargain in large proportions. Where employees are not granted the right to bargain, very little unionization that takes place.

Other research has suggested that the passage of a bargaining law provides the primary stimulant to unionization in the public sector.

What I think the numbers suggest is that public employees express a great desire to unionize once they are given a collective bargaining law that allows them to unionize.

The data also suggest that public employees in States that currently do not have collective bargaining laws would likely choose to unionize if they, too, were given some sort of protected right to unionize, that is, if they were covered by bargaining legislation.

The tremendous growth of public sector unionism and bargaining under public sector laws suggests a paradox, at least in my mind, when you compare the public sector and private sector experiences. That is, although the National Labor Relations Act provided the model for public sector collective bargaining laws, that law tends to be less restrictive than the public sector laws that have been enacted.

For example, many of the public sector laws prohibit employees from striking; the public sector laws also restrict the scope of bargaining more than the National Labor Relations Act does.

The paradox, then, is why has public sector unionism grown so tremendously over the past 25 years under more restrictive laws, while private sector unionism has declined precipitously under a less restrictive law.

I suspect that the paradox is explained partly by differences between the public and private sectors—differences that include market-related factors. For example, in the public sector, there is no capital mobility; employers cannot relocate a city in order to avoid a union. There are also political factors that influence the differences.

The political process provides a discipline on public employers that constrains the tactics they may use in union organizing campaigns. This type of discipline simply does not exist in the private sector, as Professor Dickens' testimony and the testimony of the other witnesses suggested in the last panel.

I do not believe there is any reason to think that public employees are somehow substantially different from private sector employees. Many public sector occupations are similar to private sector occupations.

Collective bargaining serves the same function in both the public and private sectors. It gives employees a say in work place decisions, and it protects them from arbitrary employer treatment. Collective bargaining is the only process we have that provides those types of protections to employees.

The research that has been conducted on bargaining laws in the public sector suggests that the individual provisions of those laws have a tremendous impact on the unionization and bargaining outcomes that occur. This research is unique from an academic perspective in that it is virtually unanimous in its findings. There are very few differences across the studies, though different people have interpreted the results in different ways.

To sum up, private sector employees may increasingly be unable to exercise their right to express free choice under the National Labor Relations Act because they are in an environment where employers engage in illegal practices that effectively deny employees their rights. Those practices do not seem to occur in the public sector. And again, the reason I think they do not occur is because of the impact that the political process has on public employers' ability to oppose unions.

At the same time, data suggest that public sector employees who are not covered by bargaining laws are denied their right to bargain collectively. They are denied that right just as effectively as are private sector employees who are illegally discriminated against by their employers. The Committee may wish to consider this issue when it evaluates potential private sector labor law reforms.

I believe that all employees should be provided with a right to decide freely to join or not join a union and to participate in union activities. That right should be exercised in a noncoercive atmosphere and in a unit that is appropriate for collective bargaining.

I also believe that all employers should obey the labor laws. Public policy changes could help to achieve this.

Thank you very much.

Senator **METZENBAUM**. Thank you very much, Professor Delaney.

[The prepared statement of Professor Delaney follows:]

Testimony of Professor John Thomas Delaney Before the Senate Subcommittee on Labor of the Senate Committee on Labor and Human Resources, January 29, 1988.[1]

The United States has had about 25 years of experience with "modern" public sector unionism and collective bargaining. That experience has been the subject of much research and has provided many insights into the causes and consequences of unionism and bargaining in the public sector. The purpose of this testimony is to suggest some lessons that may be derived from that research. While these lessons clearly apply to labor law and labor relations in the public sector, they also are relevant to a discussion of private sector labor law and labor relations because the legal environment governing unionism and bargaining occupies an even more prominent place in the public sector than in the private sector. That is, the diversity of federal, state, and local policies regulating unionism and bargaining in the public sector has created an excellent laboratory for debate, experimentation, and evaluation of policy alternatives. As a result, inferences may be drawn from the public sector experience regarding the potential effects of various legal arrangements in the public and private sectors.

Personal Preferences

Initially, two points should be noted regarding the interpretation of research on labor relations generally, and public sector labor relations particularly. First, considerable interpretive latitude exists in most of the writing in this area. The public sector labor relations literature contains authoritative opinions, conventional wisdom, logical arguments, case studies, classification studies, and ad hoc surveys. The research methods used are often more informal and implicit than formal and explicit, although the trend is clearly toward the latter. Substantively, this literature consists of writings about various facets of human interactions over scarce resources in adversarial contexts where the outcomes of the interactions may be valued quite differently by different writers. Moreover, many conclusions are drawn without reference to some comparison group. As a result, throughout the literature, there is considerable room for researchers' personal preferences to influence their conclusions.

Second, it is necessary to note my personal preferences so that my remarks may be placed in context. I personally am committed to the right of public and private sector employees to form, join, and involve themselves in unions in order to participate through collective bargaining and other concerted activities in decisions that affect their work lives. This view is also the bedrock principle underlying the National Labor Relations Act (NLRA) and the many public sector labor relations laws.

Observations from the Public Sector

One of the most remarkable aspects of contemporary unionism in the U.S. is that the public sector has become much more heavily unionized than the private sector in a relatively short time period. Figure 1 shows that the private sector unionization rate was about three times larger than the public sector rate in 1960. By the mid 1980s, however, the public sector unionization rate was about double the private sector rate. Today, more than one-third of full- and part-time government employees belong to unions, and approximately 45 percent of public workers are covered by collective bargaining agreements. These figures, however, mask the diversity of unionism in the public sector.

The extent of public employee unionization varies considerably across states and levels of government. Much of the variation in unionization rates is explained by the variety of legal arrangements governing bargaining across states and government levels. For instance, my research on labor relations in professional police departments in cities over 25,000 population shows a dramatic difference in unionization rates depending on whether or not a city was covered by a state law granting police officers the right to bargain collectively with their municipality. As Table 1 shows, nearly all city police departments were unionized in states that had enacted protective bargaining laws, while only a small percentage of city police departments were unionized in states that had not passed collective bargaining legislation covering police. Further, research suggests that the pattern of unionization among other public sector occupations is similar to the pattern displayed by police.[2] And empirical research confirms these trends by indicating that the primary stimulant for public sector union growth is the passage of a public sector collective bargaining law.[3]

In short, data suggest that public employees, once granted the legal right to bargain collectively, have joined unions in large numbers in order to exercise that right. In other words, it appears that public employees strongly desire unionism once they are given the opportunity to bargain with their employers.

The Table 1 data also suggest that public employees have very limited opportunities to form unions and bargain collectively with their employers in states that have not enacted public sector bargaining laws. To the extent that the government employees in states without public sector labor legislation have a similar desire for unionism as government workers in other states, the final two columns of Table 1 (panel a) suggest that those employees would embrace unionism and bargaining if they were covered by a bargaining statute.

That public sector bargaining laws strongly stimulate union growth suggests a paradox when those laws are compared with the NLRA and current private sector experience. Although the private sector labor law provided the model for public sector bargaining laws, the state statutes enacted to regulate government employee collective bargaining tend to be more restrictive than the NLRA.[4] In particular, compared to the NLRA, public sector laws generally prohibit strikes, and tend to exclude more issues from the scope of bargaining. Further, state courts have given more restrictive interpretations to aspects of public sector bargaining laws, such as the ability to execute contract clauses covering permissive bargaining issues or the obligation to arbitrate issues that are not explicitly mentioned in contractual arbitration clauses, than the U.S. Supreme Court has given to similar aspects of the NLRA.[5] Nevertheless, the unionization rate in the private sector has declined since the 1950s even though the NLRA is less restrictive than the public sector laws that have caused the surge of government employee unionism.

The paradox is probably explained by a variety of differences between the U.S. public and private sectors. Primary among these differences are environmental forces that effectively limit the extent to which an employer can oppose unionization. For reasons summarized below, public employers are more constrained than private employers in the tactics available to avoid unionization.[6]

Unlike private sector markets, the markets for government services are generally limited by political boundaries, such as the city limits or the state line. Although public employers tend to have monopolies over the provision of government services within those boundaries, they have no capital mobility (that is, the city cannot be moved to avoid unionization). Public employers may attempt to overcome unionization by looking into the privatization of certain services, subcontracting, or reductions in force, among other things. But the labor intensity of many government employee occupations and the inability to contract out some services compel government employers to accept (often reluctantly) unionization if it occurs.

Moreover, because governments exist to promote the citizenry's compliance with laws, and are ultimately responsible to the electorate, public employers are generally constrained from violating collective bargaining laws in order to avoid unionization. That is, the political process and the underlying purpose of a democratic government impose a discipline on public employers to honor the law regardless of public managers' philosophical (or pragmatic) views about the consequences of unionization. As research and testimony presented before this panel clearly show, no such discipline is imposed on private sector employers. Indeed, it has been demonstrated that it is cost-effective for private sector employers to violate the NLRA in order to defeat union organizing efforts, and it is evident that such tactics occur with unfortunate regularity.[7] The use of illegal tactics to defeat unions in the public sector does not appear to be the norm, however, and this may help to explain the great increase in public employee unionism under laws that are more restrictive than the NLRA.

In other words, sectoral differences probably force public employers to operate within the boundaries of bargaining law in exercising their opposition to unions. Private sector employers, not responsible to an electorate but extremely concerned about organizational survival in a competitive environment, are not as readily constrained in their union avoidance tactics. To the extent that private employers adopt illegal tactics, they deny employees the right to form and join unions and prevent employees from realizing their desire to bargain collectively over workplace conditions.

The Purpose of Bargaining

There is no reason to believe that employees in the public sector are somehow substantially different from private sector workers. In fact, there are many common occupations across the sectors, such as office workers, hospital employees, teachers, manual workers, and so on. Moreover, from the perspective of employees, collective bargaining serves the same purpose in the private and public sectors. Bargaining provides employees with the opportunity to have a voice in workplace decisions, and it protects them from unfair treatment by employers. To some extent, bargaining's ability to protect employees from unfair treatment may be more important in the private sector than in the public sector because government employees typically enjoy civil service protection that is unavailable to private sector employees. Nevertheless, collective bargaining is the only means by which public or private sector employees can ensure that they have a voice in the establishment of their employment terms. To the extent that alternatives to collective bargaining provide less protection to workers, it is even more problematic that private employers defeat union organizing drives through the use of illegal tactics, and that many states deny public employees statutory bargaining rights.

In short, public employees are similar to private employees. The purposes and benefits of unionization to employees are generally similar across sectors (even though private employees may gain some extra protection from organizing than do public employees). The procedures used to select union representatives are similar across sectors. But union organizing results show dramatically different pictures of outcomes across the sectors. This is a curious result whether or not you support employees' rights to join unions and bargain collectively.

The Effects of Bargaining Laws

The variety of public sector laws has permitted researchers to study empirically the impact of legal differences on unionization and bargaining outcomes. That research is virtually unanimous in showing that legal rules have substantial effects on labor relations in the public sector.[8] In addition to the impact on unionization rates discussed earlier, legal differences affect the existence and favorability to employees of contract provisions covering issues ranging from working conditions to grievance resolution. Those laws also influence public sector budgeting, as well as the occurrence of strikes and other job actions.

The research findings suggest that the legal rules governing bargaining substantially influence organizational outcomes and policies. Such outcomes help to explain strong employer opposition to bargaining.

Final Thoughts

My analysis is not meant to suggest that the current level of unionization in the private sector is a problem per se. Rather, my concern is that, relative to public employees, private employees increasingly may be unable to exercise their rights under the NLRA because of illegal employer tactics. Employees' right to choose or reject unionization freely in an appropriate bargaining unit and a noncoercive atmosphere must be protected. Within such an atmosphere, the choices made by employees should be accepted. Research suggests, however, that private sector employers have repeatedly used illegal tactics to deny employees their rights under section 7 of the NLRA. That there is no literature on such practices in the public sector may suggest that the atmosphere surrounding public sector organizing drives is more neutral than the atmosphere surrounding private sector organizing drives. At the same time, many states currently deny public employees statutory bargaining rights, and such denials preclude bargaining as effectively as do illegal employer tactics in the private sector.

It is also important to note that enough differences exist between the private and public sectors to raise a concern about overgeneralizing experiences from one sector to another. Nevertheless, my public sector research suggests some observations that are relevant to the private sector. First, public sector bargaining laws -- where they exist -- seem to match the current public sector environment fairly well, both because of their recent enactment and their regular modification. In contrast, it appears that some of the private sector industrial relations difficulties existing today are due to a discontinuity between the NLRA and the environment. Global competition, the changing nature of markets, and changing workforce demographics, among other things, have encouraged employers to undertake illegal antiunion strategies. Changes in the NLRA could reduce this discontinuity.

Second, at the very least, however, all parties should obey the labor laws. If public sector employers' union-avoidance tactics provide a baseline, then changes in the NLRA to encourage employer compliance may lead to higher private sector unionization rates. More importantly, such changes will provide greater protection to employee free choice in unionization decisions. The free choice of public employees is better protected today by labor legislation than is the free choice of private employees. This inequity deserves attention.

Finally, all employees should have the opportunity to influence their employment terms through collective bargaining if they so desire. Therefore, the fact that public employees in many states are currently denied statutory bargaining rights also deserves attention.

Notes

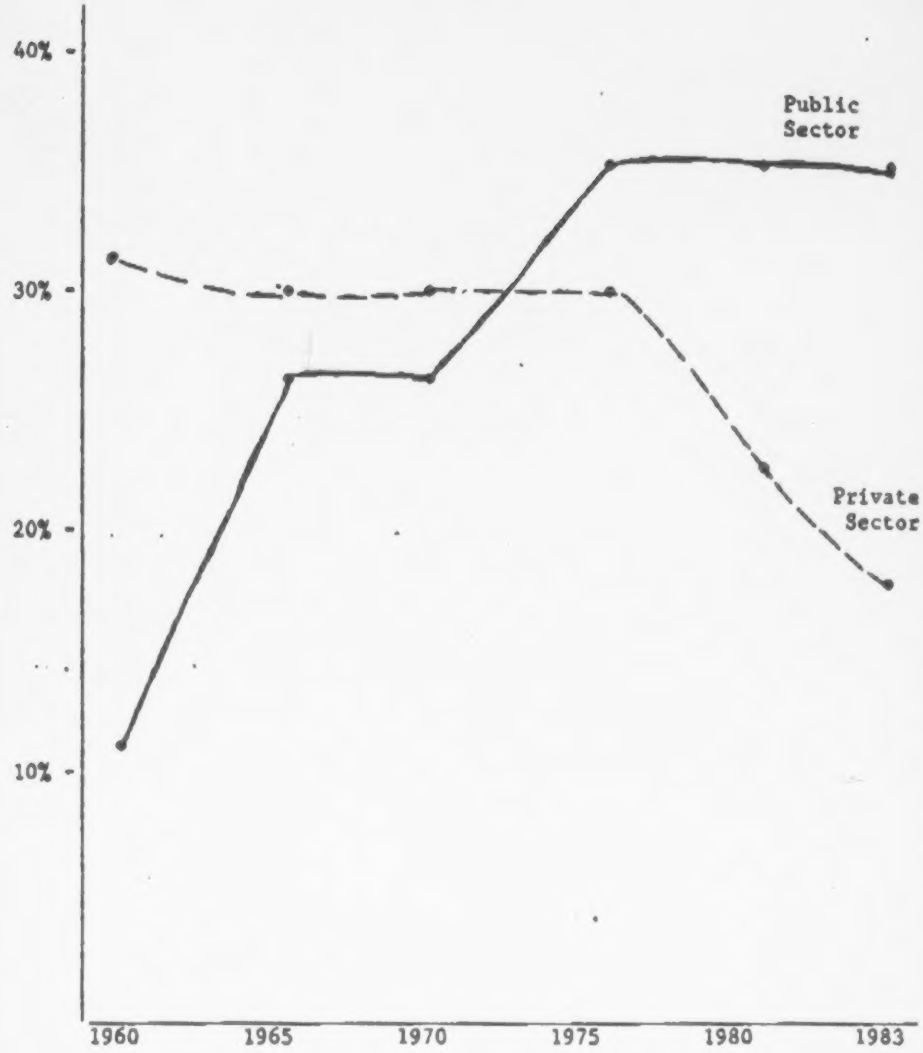
1. The author is Associate Professor at the Graduate School of Business, Columbia University. He is grateful to John Carollo and Jim Gilligan for their help in preparing this testimony.
2. For excellent overviews, see Richard B. Freeman, "Unionism Comes to the Public Sector," Journal of Economic Literature, Vol. 24, No. 1 (March 1986), pp. 41-86, and; David Lewin, Peter Feuille, Thomas A. Kochan, and John Thomas Delaney, Public Sector Labor Relations: Analysis and Readings, 3rd Ed. (Lexington, Mass.: D. C. Heath, 1988).
3. See Gregory M. Saltzman, "Bargaining Laws as a Cause and Consequence of the Growth of Teacher Unionism," Industrial and Labor Relations Review, Vol. 38, No. 3 (April 1985), pp. 335-351, and; Casey Ichniowski, "Police Union Growth and Bargaining Laws: A Proportional Hazards Approach with Time-Varying Treatments," in Richard B. Freeman and Casey Ichniowski, eds. Public Sector Unions (Chicago: University of Chicago Press, 1988).
4. See B. V. H. Schneider, "Public-Sector Labor Legislation--An Evolutionary Analysis," in Benjamin Aaron, Joseph R. Grodin, and James L. Stern, eds., Public-Sector Bargaining (Washington, D.C.: Bureau of National Affairs, 1979), pp. 191-223.
5. See Stephen F. Befort, "Public Sector Bargaining: Fiscal Crisis and Unilateral Change," University of Minnesota Law Review, Vol. 69 (1985), pp. 1221-1275.
6. These differences are analyzed in detail in John Thomas Delaney and Peter Feuille, "Police," in David B. Lipsky and Clifford Donn, eds.,

Collective Bargaining: Contemporary American Experience (Lexington, Mass." D. C. Heath, 1987), pp. 265-306.

7. The testimony was presented by Professor William Dickens. See also, Charles R. Greer and Stanley A. Martin, "Calculative Strategy Decisions During Union Organization Campaigns," Sloan Management Review, Vol. 19, No. 2 (Winter 1978), pp. 61-74, and; Morris M. Kleiner, "Unionism and Employer Discrimination: Analysis of 8(a)(3) Violations," Industrial Relations, Vol. 23, No. 2 (Spring 1984), pp. 234-243.

8. See, for instance, John Thomas Delaney, "Impasses and Teacher Contract Outcomes," Industrial Relations, Vol. 25, No. 1 (Winter 1986), pp. 45-55; Peter Feuille, John Thomas Delaney, and Wallace Hendricks, "The Impact of Interest Arbitration on Police Contracts," Industrial Relations, Vol. 24, No. 2 (Spring 1985), pp. 161-181; Gregory M. Saltzman, "Delayed but not Denied: The Enactment of Public-Sector Bargaining Legislation in Ohio and Illinois," in Richard B. Freeman and Casey Ichniowski, eds., Public Sector Unions (Chicago: University of Chicago Press, 1988); Stephen A. Woodbury, "The Scope of Bargaining and Bargaining Outcomes in the Public Schools," Industrial and Labor Relations Review, Vol. 38, No. 1 (January 1985), pp. 195-210; Craig A. Olson, "The Role of Rescheduled School Days in Teacher Strikes," Industrial and Labor Relations Review, Vol. 37, No. 4 (July 1984), pp. 515-528; Susan Schwochau, Peter Feuille, and John Thomas Delaney, "The Resource Allocation Effects of Mandated Relationships," unpublished manuscript 1987.

Figure 1
Proportion Unionized in the U.S. Workforce, by Sector, 1960-1983



Source: Based on data contained in Leo Troy and Neil Sheflin. Union Sourcebook: Membership, Structure, Finance, Directory, 1985 Edition. West Orange, N.J: Industrial Relations Data Information Service, 1985.

Table 1
An Overview of Police Collective Bargaining and Arbitration Legislation

a. States Having Legislated Bargaining Rights by 1985

State	*Law*^{a}	*Year First Bargaining Law Enacted*	*Year Arbitration Law Enacted*	*Percentage of Cities (Pop. 25,000+) Bargaining in:*^{b} 1971	1981
Alaska	DTB	1972	1972	33.3%^{c}	66.7%^{c}
California	MC	1961	–	58.7	96.4
Connecticut	DTB	1965	1975	88.9	100.0
Delaware	DTB	1965	–	66.7^{c}	100.0^{c}
District of Columbia	DTB	1970	1980	0^{c}	100.0^{c}
Florida	DTB	1974	–	0	69.8
Hawaii	DTB	1970	–	0^{c}	100.0^{c}
Illinois	DTB	1985	1985	24.4	58.2
Iowa	DTB	1974	1974	0	100.0
Kansas	MC	1971	–	0	40.0
Maine	DTB	1969	1974^{d}	100.0^{c}	100.0^{c}
Massachusetts	DTB	1965	1974–81^{e}	68.3	100.0
Michigan	DTB	1965	1969	79.5	97.6
Minnesota	DTB	1971	1973	33.3	100.0
Montana	DTB	1973	–	20.0	100.0
Nebraska	DTB	1968	1968	20.0	80.0
Nevada	DTB	1969	–	20.0	80.0
New Hampshire	DTB	1975	–	0^{c}	66.7^{c}
New Jersey	DTB	1968	1977	53.7	100.0
New York	DTB	1967	1974	82.4	94.7
Ohio	DTB	1984	1984	24.5	68.0
Oklahoma	MC	1971	–	0	73.3
Oregon	DTB	1971	1973	42.9	100.0
Pennsylvania	DTB	1968	1968	89.7	100.0
Rhode Island	DTB	1968	1970	77.8	100.0
South Dakota	DTB	1969	–	0^{c}	100.0^{c}
Vermont	DTB	1973	–	100.0^{c}	100.0^{c}
Washington	DTB	1967	1973	55.6	94.4
Wisconsin	DTB	1959	1972	85.7	100.0

b. States with No Legislated Bargaining Rights as of 1985

State	*Percentage of Cities (pop 25,000+) Bargaining in:*^{b} *1971*	*1981*	*State*	*Percentage of Cities (pop. 25,000+) Bargaining in:*^{b} *1971*	*1981*
Alabama	0	12.5%	Missouri	0	11.8%
Arizona	0	25.0	New Mexico	14.3	25.0
Arkansas	0	25.0	North Carolina	0	0
Colorado	6.3	25.0	North Dakota	0^{c}	0^{c}

Table 1 *continued*

Georgia	0	0	South Carolina	0	0
Idaho	0	40.0	Tennessee	9.1	18.2
Indiana[f]	14.0	52.4	Texas[f]	0	14.8
Kentucky[f]	0	22.2	Utah	0	16.7
Louisiana	0	18.2	Virginia	0	0
Maryland[f]	16.7	33.3	West Virginia	14.3	28.6
Mississippi	0	14.3	Wyoming	33.3[c]	33.3[c]

Sources: Information on bargaining and arbitration laws was obtained from the state laws as reported in Bureau of National Affairs (n.d.). City bargaining data were calculated from a survey conducted by the authors in 1981.

[a] DTB = duty to bargain law; MC = meet and confer law; and a dash = no statewide arbitration law.

[b] The percentages in these two columns are based on cities whose bargaining status we were able to identify (which included more than 90 percent of all cities).

[c] These percentages were calculated from data on fewer than five cities in the state.

[d] The Maine arbitration law is binding only for nonwage bargaining subjects.

[e] The Massachusetts arbitration law was repealed indirectly when Proposition 2 1/2, a property tax limitation referendum, was passed in November 1980.

[f] Indiana passed a collective bargaining law in 1975 that was declared unconstitutional by the state supreme court in 1977. Kentucky, Maryland, and Texas have enacted collective bargaining laws that are restricted to specific communities or require citizen approval in a referendum election.

Table reprinted from: John Thomas Delaney and Peter Feuille, "Police," in David B. Lipsky and Clifford Donn, eds., Collective Bargaining in American Industry: Contemporary American Experience. (Lexington, Mass.: D.C. Heath, 1987), pp. 276-277.

Senator METZENBAUM. Ms. Hicks, do you believe that your co-workers' interest in the collective bargaining process is affected by the attitude taken by the employer?

Ms. HICKS. Exactly.

Senator METZENBAUM. Do you feel the same way, Mr. Encinas?

Mr. ENCINAS. Yes, Senator.

Senator METZENBAUM. Explain to me your answer, if you would please, Ms. Hicks.

Ms. HICKS. How far do you want me to go back?

Senator METZENBAUM. It is your choice, except there is limited time; but it is your choice.

Ms. HICKS. When I first started working for the State of Ohio, I was making $1.45 an hour, and I saw that increase gradually. And since 1984, or I would say, two years ago, when we successfully negotiated our first contract under the new collective bargaining law, it was a sense of pride and dignity throughout the facility in which I work, and I saw it from both ends. I really saw it from the employees' standpoint, and I saw it also from the employers' standpoint.

We have respect on both sides. They respect our position, and we respect their position.

Senator METZENBAUM. Thank you very much.

Mr. Encinas, would you care to comment?

Mr. ENCINAS. In our collective bargaining process in the State of New Mexico, we do not bargain for monetary issues or wages, but what we do bargain for is the working conditions and the safety, matters of concern to the employees. Since we lost that, the employees have felt a tremendous loss, by losing the collective bargaining process that they had actually since 1974.

Senator METZENBAUM. Has the employer's attitude changed since the actions of the Attorney General?

Mr. ENCINAS. The employer, the Highway Department, has been very supportive. I stated in my testimony that they were very supportive. They felt that with the bargaining unit, they had the best labor relations of any State agency in the State of New Mexico. Their dilemma is having to deal with the employees and the low morale and not being able to administer the benefits that the employees have been used to. But we do have a very good relationship with the agency.

Senator METZENBAUM. Professor Delaney, you point out that public employers differ from private employers in at least two important respects—they have no capital mobility, and they are accountable to the electorate. Do you believe that public sector labor laws can serve as some kind of model for the private sector, notwithstanding the structural differences you identified between public and private sector industrial relations?

Professor DELANEY. I think that we can draw some inferences, Senator, from the public sector labor laws and the public sector experience that would be relevant to the private sector.

I must initially reiterate, however, that we will never be able to overcome some structural differences between the sectors. Keeping that in mind, I believe that the public sector laws and experience suggest that employees have a better opportunity to express their free choice in favor of or against a union in an atmosphere where employers are less coercive during organizing campaigns.

I think that the public sector embodies this more neutral environment. In the private sector, we see exactly the opposite. And I believe that private sector employees, therefore, are in a more coercive environment, and they are less able to choose freely to join a union or not to join a union.

But I believe that we can draw an inference from the experience: Public sector laws, seem to operate somehow more in continuity with the public sector environment than the current private sector law operates relative to the private sector environment. This fact may help us to understand the kinds of changes in private sector labor law that may be needed today.

Senator **METZENBAUM**. Thank you very much.

I want to thank the entire panel, and I will say that some of you have written statements, as well as on the previous panel and all panels, and those written statements will be included in the record in their entirety.

Thank you so much for your testimony.

Our next and last panel relates to the subject of professional employees.

We welcome Frederick Swan, of Lexington, North Carolina; William Ragen, of New York; and Professor Matthew Finkin, Southern Methodist University School of Law in Dallas, Texas.

Mr. Swan, please proceed.

STATEMENTS OF FREDERICK SWAN, LEXINGTON, NC; WILLIAM RAGEN, NEW YORK, NY; PROF. MATTHEW FINKIN, SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW, DALLAS, TX

Mr. **SWAN**. Senator Metzenbaum, I am Frederick Swan, from Livingstone College in Salisbury, North Carolina. I and a number of other faculty members tried to organize a union in 1980.

In February of 1981, we had a representational hearing. As a result of this hearing, the regional director declared that the faculty at Livingstone College was not management, under the *Yeshiva* decision. The *Yeshiva* decision happens to be a Supreme Court decision that said that the faculty at Yeshiva University, because of their tenure, voice in administrative affairs particularly hiring administrators, and setting salaries, made them management and therefore not under the National Labor Relations Act.

Our director did not so rule. He ruled that we were not management. Elections were scheduled for March of 1981. Elections were held—that is all the good news. It is all down hill from here.

The National Board decided to review our case, and the votes were never counted from that election. In fact, the votes have not been counted to this very day and may never be counted.

In November of 1987, the National Board finally completed its review of our case and decided that the faculty at Livingstone College, which does not have tenure and has never had an autonomous faculty body, has been clearly separate from administration by the college—in other words, separate from management—is management under the *Yeshiva* decision, and therefore were not protected by the National Labor Relations Act and do not have a right to bargain with Livingstone College; or, to put it another light, Livingstone College does not have to bargain with us.

In going back to 1981 again, in April of 1981—and in my written statement, that date is not in there; I just looked it up this morning, because it has been so long, and it is hard for me to get the records, and I hope you can understand that—I found that we had a representational hearing for the staff, most of whom get paid about minimum wage. A lot of them have wonderful titles, but they do ordinary work, and they get paid minimum wage and have virtually no benefits.

The staff has not been allowed to hold an election to this very day because another issue in our representational hearing for the faculty was *Catholic Bishop.* In other words, the school claimed that they were a religious institution, such as a parochial school—of course, a large amount of our money is Federal money, and obviously you cannot get Federal money if you are a parochial school because of the First Amendment. Nonetheless, that was raised by their lawyers, and that, too, was not decided until November of 1987. They held off a decision on the staff right to hold an election until the National Board ruled on the *Catholic Bishop* decision.

The Board did rule that we do not fall under *Catholic Bishop* and that the school is not a religious school as defined in the *Catholic Bishop* decision.

Now, I think a number of rather important questions are raised here. First of all, the Board has called us management because we have control over our courses and we have control over the curriculum, and these are professional responsibilities.

Does that mean that because we have a skill that we should not be allowed to have some say in the running of the institution we are in, because that is what it amounts to. They have a legal fiction saying we are management. I really think the law should be changed, hopefully, with some reform legislation so professionals such as ourselves can actually have a voice in the institutions being run not only for our own personal benefit but also for the benefit of the institution—our wages are deplorably low; we have an average salary for faculty of around $18,600 as reported by the school, and I am sure that it not an understatement of our average income, whereas presumably the national average for schools of our type is in the neighborhood of $26,000 and for professors in general is $33,000. So you can see we are significantly below the average.

The only fringe benefit other than Social Security, which is mandated by law, that we have is that some of us have 5 percent matching retirement. I am one of them. I do not have any idea what percentage of the school has it. Salaries are a total secret at the school and deliberately maintained that way, so there is no way I can authoritatively say anything about the salaries other than what the school itself has reported.

I do know a number of faculty who have been there a long time and they get under $15,000 per year. That I can state for a fact, because I go and ask them, "What do you get paid?" and they tell me. But that is not a representative sample.

All right. If, as professionals, we could have a voice in running the school, and at least have information about the school and be able to discuss the school, maybe we could have eliminated some of the problems the school has had. Large numbers of good faculty and large numbers of talented administrators have left the school because of disaffection.

The school has had four presidents in the ten years that I have been there—I have been there since 1977—and the school has been constantly in financial trouble and has suffered declining enrollment.

Now, it is possible that we as professionals could have helped them if we could have had a voice. But with the present structure, when we are not allowed to bargain collectively, we have no way of dealing with problems like this because the school is in fact set up to keep faculty and staff clearly separate from the rest of the institution. I think really our problems here are endemic throughout the United States, that professionals of all types need the right to bargain collectively with their enterprises, not only for personal benefits, but also to help the enterprises themselves.

We have a lot of expertise, and I do not mean just ourselves as faculty, but many professionals throughout many fields, whether they are accountants or what-have-you. And if we say we are not management, we ought to know. There should not be a legal fiction that says we can be defined as management despite what our working conditions are because we have technical and professional skills.

Thank you.

[The prepared statement of Mr. Swan follows:]

TESTIMONY OF FREDERICK R. SWAN
BEFORE THE
SUBCOMMITTEE ON LABOR
SENATE LABOR AND HUMAN RESOURCES COMMITTEE

My name is Frederick R. Swan. I am an associate professor of Political Science at Livingstone College in Salisbury, North Carolina. I have been employed at Livingstone College since 1977. I am a member of the Executive Council of the North Carolina Political Science Association. I am also serving as the president of the United Federation of Faculty and Staff at Livingstone College, a local affiliated with the American Federation of Teachers.

I am testifying today because I want to call attention to the plight of the faculty at Livingstone College as a consequence of their inability to engage in collective bargaining under the protection of the NLRA.

In 1980, we faculty members at Livingstone College believed that our common problems could be better addressed through collective bargaining. These problems focussed on our working conditions as well as on our ability to function effectively as professionals.

There is no tenure system at Livingstone College, so that faculty members lack the security and continuity of employment which most college and university professors have. Faculty members generally are employed under one year contracts which are signed by the President of the College. In addition to this lack of job security, our salaries are way below those paid to college and university professors elsewhere in the country.

During 1985-86 the average faculty salary, as reported by the College was $18,600. In contrast, the average salary paid during the 1985-86 academic year to college and university professors nationwide was $33,090; and the average salary paid to faculty members employed during this period at institutions similar to ours was $26,920. Moreover, faculty members have no input at all into the determination of the amount of money to be set aside for faculty salaries or how these funds are to be allocated among individual faculty members. These decisions are made by administrators arbitrarily and in secret. Even department and division chairs have no input in this area.

Fringe benefits are virtually nonexistent at the College and, like salaries, are subject to arbitrary administrative change without any faculty input. Just this last year the College discontinued its Blue Cross/Blue Shield medical coverage, substituted private coverage at the same time, and eliminated the College's contribution to the cost.

Consistent with this lack of influence on our working conditions, the faculty lacks an effective voice in College-wide academic matters. There has never been a faculty senate or a comparable faculty organization at Livingstone College during the ten years I have been on the faculty. When the faculty meets, it is almost always at meetings called by a member of the administration; and these meetings include all college personnel including secretaries, maintenance people, and assorted other employees. Even divisional and departmental chairs, who serve in effect as our representatives to the administration, lack any decision making voice in the College. In a word, there is and always has been a clear demarcation between administration (or management) and the faculty at Livingstone.

We requested reognition for our organization in 1980, and were turned down by the College. We then filed a petition with the Regional Office of the NLRB. After several days of hearings over the question of whether or not we were managerial employees, the Regional Director directed an election, which was conducted in March of 1981.

The Regional Director found that the College administration exercised control over the budget, especially including the salary and benefits paid to faculty members. He also observed that all but a very few of the faculty were employed pursuant to annual contracts signed by the College President. These and other factors supported the Regional Director's commonsense conclusion that the faculty were not managerial employees and were fully entitled to engage in collective bargaining under the protection of the NLRA. 1/

The election was conducted and the ballots were cast. But the NLRB granted the College's request for review of the Regional Director's decision and ordered the ballots impounded.

The NLRB did not render its decision in the faculty petition

1/ The Regional Director also overruled the College's argument that it was a religious institution within the meaning of the Supreme Court's decision in Catholic Bishop of Chicago.

until just last November--seven years after we asked the Regional office to let us vote on collective bargaining. The Board, relying on the Supreme Court's decision in NLRB v. Yeshiva University, held that we were all managerial employees and dismissed our petition.

The Board held we were managers principally because of our work in curriculum planning and other related academic matters. But this work is strictly a product of our professional expertise. I have always considered that developing the content of my courses, grading the students I teach, and working with my colleagues to plan our departmental curriculum is an important part of my work as a professional. In doing this work, I rely on my professional judgment as to what a student needs to learn in order to have a basic knowledge of political science. And when the members of my department get together to plan a new course or some variation in an existing course, we pool our expertise in arriving at our decisions. If a College is to carry out its obligations to its students, it is necessary for faculty members to engage in this academic work. It is impossible for a college administrator to perform these functions because they lack the necessary expertise.

As I see it, we were denied the right to form a union and bargain with the Board of Trustees of the College because of the things we have to do as professional employees. As a consequence, not only do we lack influence on our working conditions, we also lack the status to exert our influence as true professionals.

There is more at stake here than a legitimate difference of opinion over a sophisticated legal issue. The National Labor Relations Act is supposed to help employees form unions to bargain with their employers and thereby gain a greater voice in the establishment of their working conditions. We were denied that opportunity when the NLRB found that we were managers. For us faculty members at Livingstone College, the conclusion that we are managers would be laughable, if it were not so serious to us. For us, the law has proved worse than useless. After voting for collective bargaining--and I have no doubt that a decisive majority of the faculty voted for collective bargaining-- we waited for seven years to learn that we were managers.

Although I admit I am primarily interested in our efforts to achieve a greater faculty voice at Livingstone College through collective bargaining, I believe that the way we were treated raises issues which are important to others as well. With the national need to become more competitive and the need for greater input for all in this increasingly specialized and technological society, it is unwise to treat all employees like the old time plantation field hands. I believe that Livingstone College has paid a high price for the lack of greater faculty involvement in decision making. We have faced declining enrollment and four different presidents while I have been here. We have constantly been in financial difficulty. Large numbers of faculty and administrators have left the school because of disaffection. I do not know for sure whether a faculty with bargaining rights could have improved things. I believe that we could have. We certainly would not have made things worse.

Many schools and businesses have been faced with difficulties comparable to those experienced by Livingstone College. I believe that businesses and schools and colleges and universities benefit from greater participation on the part of their employees in the important decisions which affect the business. After all, these employees have a strong vested interest in improving the viability of the organizations that they work for; and they have an intimate knowledge of the business itself. I think it is a tragedy that we cannot depend on the National Labor Relations Act to bring about more meaningful involvement on the part of employees in the decisions which affect their livlihoods--especially when it appears to me that such involvement promises gains beyond those experienced by the employees themselves.

Senator Metzenbaum. It is a little hard to understand, the NLRB's conclusion that you are management personnel. I agree with you, I guess, that the only way you can do anything about that is to change the law, unless the NLRB goes back itself and reexamines its own decision, which I doubt very much will occur, and certainly won't occur under the present circumstances.

Livingstone College is how big a college?

Mr. Swan. We have in the neighborhood—and believe me, nobody can come up with precise figures, but we have in the neighborhood of around 650 students. It fluctuates greatly.

Senator Metzenbaum. And did I understand you to say that it has a religious identification?

Mr. Swan. Yes, it does, with the African Methodist Episcopal Zion Church. They are very generous in the amount of money that they send to the school. The Board of Trustees also has a large number of bishops from the AME Zion Church.

Senator Metzenbaum. Thank you.

Mr. William Ragen, of the New York Committee of Interns and Residents. We are happy to hear from you, sir.

Mr. Ragen. Good morning, and thank you for the opportunity to appear here.

My name is William Ragen, and I am an organizer for the Committee of Interns and Residents, a union of resident doctors in New York, New Jersey and Washington, D.C.

We have the opposite problem of Mr. Swan. Residents are not covered by the NLRB because they are considered students, not employees, in the Cedars Sinai decision.

I am here today to explain why resident doctors need collective bargaining and what happens because they are not covered by the Act. I would like to give a brief overview of residents' jobs and their union, the Committee of Interns and Residents, or CIR. Then I will speak about what happened at one hospital, Saint John's Episcopal Hospital in Queens, New York, when that hospital refused to negotiate a new collective bargaining agreement. Originally, one of those residents was to appear here today. However, due to pressure from the hospital administration, he withdrew as a witness.

Senator Metzenbaum. Just elaborate upon that. What do you mean? What kind of pressure was brought to bear upon him?

Mr. Ragen. He told an assistant administrator of the hospital that he would be appearing before your Committee. I guess he needed to arrange to get time off. And before the day was out, he was in a room with his department director, the director of the hospital, and three other administrators, and—I was not in the room, but the upshot was that he was apparently intimidated out of coming down here. They pressured him not to testify.

Senator Metzenbaum. I would just say that as Chairman of this Subcommittee, it is disappointing to me that those in control at Saint John's Episcopal Hospital would pressure a person from coming to testify before a United States Senate Committee—just as I indicated my concern before about any action that Kawasaki might take against an earlier witness.

I just have to say that there is something wrong when those who are in positions of responsibility bring that kind of pressure. I am almost tempted to go forward with a second hearing and bring in the administrators, to ask them under what circumstances and what form of Americanism do they tell one of their people that he cannot or should not testify before a committee of the United States Senate.

I am just absolutely astounded, and I am much disturbed by this. Regardless of who the administrators might be, or what kind of a hospital it might be, I think this is something totally inappropriate and wrong. And I will be very happy to share that with the people who brought him in. How high up the line did that go, do you know? In other words, was it the administrator of the hospital? Was it just those who were immediate superiors of the individual? What were the circumstances?

Mr. RAGEN. It went as high as the director of the hospital. It may have gone higher, I do not know. But the director of the hospital himself spoke with this doctor. So it went high up.

Senator METZENBAUM. And the man who would have testified, was he a resident?

Mr. RAGEN. Yes.

Senator METZENBAUM. Thank you very much. Please proceed.

Mr. RAGEN. Thank you.

Upon completion of medical school, virtually all doctors enter a residency training program. It is essential that they complete such a program after medical school. Residents perform a wide range of duties. Although they are supervised by senior doctors, including senior residents, most of that supervision is retrospective.

At Saint John's Hospital, about 70 percent of the physician work is done by residents as opposed to by their senior colleagues. Practically all the coverage of patients at night and on weekends is provided by residents. The teams assigned to respond to emergencies such as heart attacks and respiratory arrests are staffed by residents.

Residents in the department of Ob/Gyn regularly deliver babies, and resident surgeons often perform operations without the direct supervision of the senior doctors.

Here in Washington, if you walk into an emergency room at Washington Hospital Center or D.C. General, chances are you will be treated by a resident.

They not only provide all manner of physician services, but they also work long hours doing so. They provide coverage around the clock and regularly work up to 36 hours at a time. When on call, a resident usually gets only three or four hours of sleep. They are commonly on call one night in three, and often work 100 hours per week, sometimes more.

Given the fact that they work such long hours, and that back in the good old days, they were paid practically nothing to do so, it should be no surprise that residents started a union.

The CIR was formed in 1957. The residents at Saint John's decided to join in 1979. At that time, they were among the worst-paid residents in New York. They had to wait as long as nine months to become eligible for benefits; shortages of staff and equipment compromised patient care, and paychecks were often illegally withheld for getting a little behind in paperwork, which is something that commonly happens when one works 100 hours a week.

The decision to unionize was made only after months of discussions with the hospital administration. Many promises were made, and none were kept. It became apparent that the only way to improve working conditions and have an effective voice in the running of the hospital was through a union contract.

Since the residents were not covered by the NLRA, a strike deadline was necessary to compel the administration to bargain. Between then and 1986, conditions improved dramatically. They went from being among the worst to among the best-paid residents in New York. More importantly, they had a voice in the running of the hospital and could effectively speak out on patient care concerns.

Their last contract expired on December 31, 1986. In September 1986, the hospital administration informed CIR that it would not negotiate a new contract. We were told that the administration was "philosophically opposed" to unions and would deal with the doctors individually.

Such a policy was not reassuring, given the hospital's pre-union record. In spite of the residents' unanimous support for the union, the administration refused to renegotiate. We received support of local elected officials, other unions, and labor-religion coalitions. Demonstrations of union support, such as well-attended lunch time rallies, were held.

We appealed to the Episcopal Bishop of Long Island, Robert Witcher, who is also president of the Hospital Board of Trustees. The hospital is part of his diocese's Church Charity Foundation.

Bishop Witcher's only response was to say he would not get involved.

In the end, the residents were left with two choices—to surrender or to strike. They received numerous threats and were told that their careers would be ruined if they went out on strike.

As the contract expiration date approached, the residents at Saint John's, with great reluctance, voted to strike. It was a difficult decision. They were all extremely concerned about what would happen to their patients. Many of the functions the residents performed, especially responses to emergencies, could not and would not be performed by the senior doctors.

Also, they were scared. There are far more doctors looking for residencies than physicians available. It was feared that the hospital might fire and replace the doctors. And there were other threats—a bad recommendation from one's chairman can ruin a resident's career. After working so hard in college, then in medical school, then as a resident, after running up tens of thousands of dollars in student loans, that is not a risk one takes lightly.

Many of the residents had been personally intimidated by administrators. They were terrified. The intimidation continues as we were just discussing with regard to the doctor who did not come down today.

The residents all wanted CIR and felt strongly about that. And they were extremely frustrated that the administration would not do something so simple as to sit down and renegotiate their contract. But in the end, they did not strike, and they lost their union.

Senator, this is no way to handle labor relations. Although the residents may have not succeeded this time, the issues that caused them to unionize in 1979 will not go away. They are employees and, as with all employees, they have disagreements with management over work conditions.

The bargaining table is a rational place to resolve these differences. Currently, matters are decided by force. When the Saint John's doctors first joined CIR, it was the threat of a strike that began negotiations. When the hospital busted the doctor's union, it did so by threatening people's careers.

These are not isolated incidents. The same has happened at other hospitals in New York and other parts of the country. Such an approach to labor relations would be disruptive in any industry. But in hospitals, it is especially dangerous.

I might add that residents in the public sector do not have this problem. Virtually all residents in New York and New Jersey are unionized, and there are residents' unions from Boston to Los Angeles.

This is no way to run hospitals or train doctors. For the sake of their rights and the rights of their patients, the Act should include residents. They belong with their patients, not on the picket line.

Thank you very much.

Senator METZENBAUM. Thank you very much, Mr. Ragen.

[The prepared statement of Mr. Ragen with an attachment follows:

TESTIMONY BY WILLIAM RAGEN TO THE SUBCOMMITTEE ON LABOR OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, JANUARY 29, 1988

Good morning, and thank you for the opportunity to appear before this committee.

My name is William Ragen and I am an organizer for the Committee of Interns and Residents, a union of resident doctors in New York, New Jersey and Washington, D.C.

I am here today to explain why resident doctors need collective bargaining, and what happens because they are not covered by the NLRA. I would like to give a brief overview of residents' jobs and their union, the Committee of Interns and Residents, or for short, CIR. Then I will speak of what happened when one hospital - St. John's Episcopal Hospital in Queens, New York - refused to negotiate a new collective bargaining agreement with its residents. Originally, one of those residents was to appear here today. However, due to pressure from the hospital administration, he withdrew as a witness.

Upon completion of medical school, virtually all doctors enter a residency training program. For all practical purposes it is essential that a doctor complete such a program. All but four states require at least one year of residency training before they will grant a license, and most hospitals require completion of residency before granting admissions privileges.

Residency programs for most specialties last between three to five years. Further specialization usually requires a two year fellowship.

Residents perform a wide range of duties. Although they are supervised by senior doctors, including senior residents, most of that supervision is retrospective. At St. John's hospital, about 70 percent of the physician work is done by residents, as opposed to their senior colleagues. Practically all of the coverage of patients at night and on weekends is provided by resident doctors. The teams assigned to respond to emergencies such as heart attacks and respiratory arrests are staffed by residents. Residents in the department of Ob/Gyn regularly deliver babies, and resident surgeons often perform operations without the direct supervision of the senior doctors. Here in Washington, if you walk into an emergency room at the Washington Hospital Center or D.C. General, chances are you will be treated by a resident.

They not only provide all manner of physician services, but also spend long hours doing so. They provide coverage around the clock and regularly work up to 36 hours at a time. For example, somebody on call on Monday night, comes in Monday morning at 8:00, works all day, spends the evening admitting new patients and checking others, responds to emergencies or other problems at night, and then works all day Tuesday. When on call, a resident usually gets only 3 or 4 hours of sleep. They are commonly on call one night out of three, and often work one hundred hours per week, and sometimes more.

Given the fact that they work such long hours, and that, back in the good old days, they were paid practically nothing to do so, it should be no surprise that residents started a union. The Committee of Interns and Residents was formed in 1957.

The residents at St. John's hospital decided to join in 1979. At that time, they were among the worst paid residents in New York. They had to wait as long as nine months to become eligible for benefits. Shortages of staff and equipment compromised patient care. Paychecks were often illegally withheld for getting a little behind in paperwork -- which often happens when one is working a hundred hours per week.

The decision to unionize was made only after months of discussions with the hospital administration. Many promises were made, and none were kept. It became apparent that the only way to improve working conditions, and to have an effective voice in patient care, was to negotiate a union contract. Since they were not covered by the NLRA, a strike vote was necessary to compel the administration to bargain. Its response was to threaten reprisals and predict dire consequences. Finally, on the eve of a strike deadline, the administration recognized CIR and negotiations began.

Between then and 1986, conditions improved dramatically. They went from being among the worst to among the best paid residents in New York. More importantly, the residents had a voice in the running of the hospital, and could effectively speak out on patient care concerns.

Their last contract expired on December 31, 1986. In September 1986 the hospital informed CIR that it would not negotiate a new contract. We were told that the administration was "philosophically opposed" to unions and would deal with the doctors individually.

Such a policy was not reassuring, given the hospital's pre-union record. In spite of the residents' unanimous support for the union, the administration refused to renegotiate the contract. We received the support of local elected officials, other unions, and labor-religion coalitions. Demonstrations of union support, such as well-attended lunch-time rallies, were held. We appealed to the Episcopal Bishop of Long Island, Robert Witcher, who is also President of the Hospital Board of Trustees. The hospital is part of his diocese's Church Charity Foundation. Bishop Witcher's only response was to say that he would not get involved.

In the end, the residents were left with two alternatives: to surrender or to strike. They received numerous threats and were told that their careers would be ruined if they persisted in demanding their rights.

They did not want to strike. They work with residents from a sister hospital, Interfaith Medical Center, in Brooklyn. In June, 1985 those residents had to strike for three weeks when their administration broke off negotiations with CIR. The residents eventually prevailed, but at a tremendous cost. They had to bear incredible threats. The hospital suffered over two million dollars in lost revenues. And, worst of all, that community, a medically underserved area to begin with, was without a functioning hospital. Despite this loss of hospital service, the striking doctors received substantial support from all local elected officials, including Congressman Major Owens.

As the contract expiration date approached, the residents at St.John's, with great reluctance, voted to strike. It was a difficult decision. They were all extremely concerned about what would happen to their patients. Many of the functions the residents perform, especially the response to emergencies, could not be provided by their senior colleagues.

Also, they were scared. There are far more doctors looking for residencies than positions available. St. John's is a small program, and it was feared the hospital might fire and replace the doctors. There were other threats. A bad recommendation from one's chairman can ruin a resident's career. After working so hard in college, then for four years in medical school, then as a resident, after running up tens of thousands of dollars in student loans, that is not a risk one takes lightly. Many of the residents had been personally intimidated by administrators. The residents were terrified. That intimidation continues; the administration pressured the doctor who was to appear here today out of testifying. In the end, the residents did not strike, and lost their union.

The residents all wanted CIR, and felt strongly about that. And they were extremely frustrated that the administration would not do something so simple as sit down and negotiate in good faith. But, in the end, they did not strike, and lost their union.

This is no way to handle labor relations. Although the residents may not have succeeded this time, the issues that caused them to unionize in 1979 will not go away. They are employees and, as with all employees, they have disagreements with management over work conditions. The bargaining table is a rational place to resolve these differences. Currently matters are decided by force. When St.John's doctors first joined CIR, they gained union recognition by threatening to strike. When the administration busted the union, it did so by threats of retaliation should they strike. The residents at Interfaith Medical Center, as I mentioned earlier, did strike for three weeks. These are not isolated incidents; the same has happened at many other hospitals, in New York and elsewhere.

Such an approach to labor relations would be disruptive in any industry. That this should be the case for hospitals is especially dangerous.

Residents in the public sector generally do not have this problem. Residents in public hospitals in several states, including New York, New Jersey, Massachusetts, Illinois and California, as well as in the federal sector, belong to unions and have the same bargaining rights as other employees.

This is no way to run hospitals or train doctors. For the sake of their rights, and the rights of their patients, the Act should include residents. They belong with their patients, not on the picket line.

Thank you very much.

pt/bill-senate

CIR
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Housestaff Doctors:

The nomenclature of intern and resident doctors is confusing. William Ragen, of the Committee of Interns and Residents, testified before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources as to what happens because residents are not covered by the National Labor Relations Act.

The purpose of this is to explain who residents doctors are.

Interns, residents and fellows fall under the generic term housestaff (or housestaff officers or house officers). Housestaff included not just physicians, whether allopathic (M.D. s) or osteopathic (D.O. s), but also dentists, podiatrists, physicians assistants and veterinarians.

A housestaff doctor has completed his or her schooling (as opposed to education; all doctors, both housestaff and their senior colleagues are expected to keep up with advancements in their fields, and often must meet specific continuing Medical Education requirements). In many cases, he or she is qualified, immediately after completing schooling to go into independent, private practice. This is especially true of podiatrists, dentists and veterinarians. For physicians, most states now require at least one year of post-graduate training to be eligible for licensure.

Housestaff training is essentially an apprenticeship in a hospital based setting. Although supervised and reviewed (as is any employee), housestaff exercise a great deal of independent judgment while performing a wide range of duties from seeing patients in clinics to delivering babies.

In general, housestaff training for podiatrist last two years; dentists one to four years; and for veterinarians, one to three years. These housestaff are called residents. Residencies are not usually required for these doctors to practice in their fields.

Physician housestaff are divided into interns, residents and fellows. Interns are first year residents. An internship might be a free-standing year, with exposure to a wide variety of medical specialties (e.g., internal medicine, surgery or pediatrics), or it might be the first year in a residency in one such specialty. Residents are housestaff doctors training in a specific medical specialty. Residencies generally last from three to five years (including the first, intern, year). Further subspecialization (e.g. cardiology or plastic surgery) requires a fellowship, which is performed after completion of a residency. Most fellowships last two years.

Janet Freedman, M.D.
President
Committee of Interns and Residents

Senator METZENBAUM. Professor Matthew Finkin.

Professor FINKIN. Thank you, Senator.

I am Matthew Finkin, a member of the law faculty of Southern Methodist University in Dallas, Texas.

For the past 15 years, I have written and researched two areas closest to my heart, which are the law of labor relations and the law of higher education.

I take it my function here today is to try to put the testimony you have just heard into a somewhat larger context.

Senator METZENBAUM. Let me ask you the same question I asked the other two professors. That is, do you have any particular relationship or have you had any particular financial relationship with any unions or management?

Professor FINKIN. Well, it puts me in an anomalous position, Senator. I have not had a financial relationship with any union. I am a member, an active volunteer member, in the American Association of University Professors.

Senator METZENBAUM. That is as a member.

Professor FINKIN. As a member—which is, under the *Yeshiva* decision, an organization of management employees.

I have, however, been a paid consultant to administrations in higher education, and I function as well as a neutral labor arbitrator.

Senator METZENBAUM. Thank you very much.

Professor FINKIN. Professional employees represent a large and growing segment of the labor force. Indeed, there are over 13 million professional employees in the labor force right now, and according to Bureau of Labor Statistics figures, the rate of job growth among professionals will exceed the rate of job growth in the labor market as a whole.

Yet professionals do not fit easily into the structure of the National Labor Relations Act for the reasons adverted to in the testimony from Livingstone College.

It is the very nature of professionalism to have wider discretion governing the work that one does. Professionals have not, however, been excluded as a statutory matter under the Labor Act. Indeed, in 1947, Congress did two things. It excluded supervisors under Section (2)11 of the statute, but it made express provision for separate bargaining units of professional employees under Section (2)12.

What is interesting about that is that, in the hearings concerning both provisions, it was argued that if employees who have wide discretion supervising other employees should be excluded, so too should professional employees, who necessarily have wide discretion governing the content of their work, and may in fact actually perform occasional supervisory functions.

What Congress did was to take the language offered, I believe, by Senator Ellender, to exclude professionals altogether and use that as a definitional language for the special professional provision exemption for the treatment of separate bargaining units.

Nevertheless, the inclusion of professionals, because they differ so greatly in what they do from blue collar workers, has posed a problem for the courts and for the Labor Board. The result has been, instead of coming to grips with some of these problems, such as scope of bargaining and the like, simply to exclude them altogether from coverage of the Act—in the case of the CIR, simply to say that they are students and not statutory employees at all; in the case of college and university faculty, as in Livingstone College, to say that they are managerial personnel under the Supreme Court's 5-4 decision in the *Yeshiva* case.

Interestingly, what the court did in *Yeshiva* is take that which I think most sociologists and organizational theorists of professions would say distinguishes a profession from a nonprofessional occupation—that is to say, the nature of the discretion and the influence they have on the employer—and use that as a criterion for managerial status, and so to exclude them altogether from the coverage of the Act.

Indeed, as I point out in my written statement, the Labor Board has looked entirely to the performance of those functions as defining a manager, not in what fashion the employees have acquired that degree of prerogative over the job, such that had the faculty of Livingstone College been able to secure a collective bargaining agreement and bargain for the kind of governing structure that prevails in mainstream colleges and universities around the country, it is entirely conceivable, as in the case of the College of Osteopathic Medicine and Surgery in Iowa, that the administration could have filed a petition for unit clarification and clarified the bargaining unit as consisting entirely of managerial personnel, because the collective bargaining agreement gave the employees a say over such matters as curriculum, staffing, and the like, and therefore once again exclude them under the coverage of the Act.

Now, the Osteopathic Medicine case may strike some—it strikes me—as bizarre, but it has a kind of, if I may say colloquially, wacky logic to it. Because the dynamo that is driving the law in this area is the exclusion of a large category of persons because of reasons endemic to the work they do.

Nor has at least the Labor Board limited Yeshiva to the college and university setting, although it has had a blunting effect—it has totally prevented any further organization, significant organization, in private colleges and universities. But it has been extended as well to physicians who serve on committees in a private health maintenance organization; by the same logic that applied in Yeshiva and in the College of Osteopathic Medicine, so too do physicians who have any say in peer review, which the Congress I know has pressed the medical profession to engage in more avidly, but the more they engage in peer review one of another, the more likely it is that they will be held to be non-employees under the statute.

I think the solution at this point, the only solution because of the procedural complexion of the law, is legislation that would clarify the Act and ensure that professional employees who perform professional work, even though they exercise a wide degree of discretion necessarily in influencing the policies of the institution that employ them, are authentic statutory employees and not exempted managers.

Thank you.

[The prepared statement of Professor Finkin follows:]

TESTIMONY OF PROFESSOR MATTHEW W. FINKIN BEFORE THE SUBCOMMITTEE ON LABOR OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

My name is Matthew W. Finkin. I am currently Professor of Law at Southern Methodist University in Dallas, Texas, shortly to depart, however, for a professorship in law at the University of Illinois at Champaign-Urbana. I have taught as a visiting Professor at the law schools of Duke University and University of Michigan, and as a Fulbright Professor at Muenster University in the Federal Republic of Germany.

My principal areas of interest as teacher and researcher for the past fifteen years are in the law of labor relations and the law of higher education. I have published over thirty law review articles, critical essays, and book reviews on issues in these areas, including as study, Legislative Issues in Faculty Collective Bargaining, jointly authored with David Feller of the University of California at Berkeley, commissioned by the Carnegie Council on Policy Studies in Higher Education. In addition, I have served as a consultant to a number of agencies in higher education. At the outset, I wish to express my appreciation to the Committee for inviting me today and, more importantly, for its interest in the application of the labor Act to professional employees.

The testimony you have heard from others today bearing upon their personal experiences is not aberrational; it relates both to a long-term trend in the labor market and to a lack of responsiveness that has become built in to our basic law of labor relations as interpreted by the United States Supreme Court.

In 1930, shortly before the labor Act was enacted, "professional, technical, and kindred" workers constituted under 7% of the workforce, or 3.3 million of a workforce of 48.7 million persons.[1] Many of these were, of course, self-employed. By 1986, professional workers alone, uncoupled from technical or related support workers, amounted to 12% of a greatly expanded workforce, or 13.5 million of 111.6 million workers;[2] and, this is projected to increase by about a full percentage point by the year 2000 - to over 17 million employed professionals.[3] Closely related, this increase represents not only a proliferation of professional disciplines accompanying the explosion in knowledge and knowledge-based industry since World War II, but an exponential growth in professionals whose profession is practiced in the context of an employment relationship.

Professionals, working as salaried employees, are subject to all the restraints and conflicts that inhere in such a relationship. To be sure, some areas of resulting tension are not specific to professional employment - job security, promotion, and salary; but others are, especially the control of the content of the job - of the kinds of things professionals do that distinguishes professionals from other employees.[4] Thus one ordinarily would have thought that at least one means of dealing with conflicts between employed professionals and their employers is supplied by the National Labor Relations Act, which makes available the establishment of a collective bargaining relationship in which the parties can fashion the terms of a mutually agreeable resolution. Indeed, the Taft-Hartley Act made provision for the special situation of professional employees by establishing their right to presumptively separate bargaining units.

Neither in 1935, however, when the NLRA was enacted, nor in 1947, when this provision was added, did Congress come to grips with the circumstances of professional employment; it merely subsumed them under a law largely concerned with mass production industrial employees. This is not to suggest that the Act is unworkable when applied in the professional setting; on the contrary, all the law does is to compel the parties to negotiate and to render enforceable the bargain struck.

The difficulty lies not in the substance of the law but at the threshold question of whether professional employees may claim its protection at all; whether, that is, they are statutory employees, or are excluded as non-employee "students,"[5] as "independent contractors,"[6] or as performing work of a managerial character. Because the latter poses the most significant obstacle, I shall direct my remarks to it. But it is important to stress that in all three areas, due perhaps to a perceived difficulty of fitting these employees into the scheme of the labor Act, the choice that has been made has been to exclude them entirely.

In the case of the managerial exemption, the difficulty stems from a conflict between the axial principle about which professional work turns, and assumptions governing the nature of the employer-employee relationship embodied in the decision of the United States Supreme Court in NLRB v. Yeshiva University.[7]

The case concerned the status of a University faculty; but it cannot be, nor has it been limited to the academic profession. In Yeshiva, as in virtually all of higher education, the faculty plays an influential and often dispositive role in developing and executing educational policy: degree requirements, admissions standards, curriculum, grading, and the like. The status of the faculty was challenged as being composed entirely of managerial personnel, of those who under the Court's reading of the Act, "formulate or effectuate management policy." The Court held that they were, albeit by vote of 5 to 4. The crux of the Court's reasoning is:

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to

> be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.[8]

The assumption, as the distinguished sociologist of the professions, Eliot Freidson, has pointed out is that "management formulates the work to be done, tells the worker to do it, and supervises to make sure that it is done correctly, by management's criteria. Management is active, and the workers are passive."[9] But the axial professional principle is one of autonomy in the work to be done and of adherence to professional not hierarchical norms of accountability often exercised through collegial not hierarchical controls. As Freidson explains, the autonomy professionals have, and must have if they are to perform as professionals, means that much that otherwise would be done by managers in industry is done by them. This is amply illustrated in higher education, an archetype of the employed profession. As the former Controller of Teachers College, Columbia University, observed, "The board [of trustees] in fulfilling its responsibilities for management, requires the aid of the faculty . . . because the board does not, unaided, possess the best judgment on all matters involved."[10] A leading study of academic governance points out to similar effect that, "Decision-making in the university must involve the teacher-researcher 'on the assembly line' because he chiefly knows intimately what the 'production' of the university is all about . . . ."[11] Accordingly, faculty do not view unilateral pronouncements by the Board or administration as legitimate if they are announced *ex cathedra* without prior faculty consultation. Concomitantly, the faculty's participation has long been viewed as a bulwark against the intrusion of an aprofessional judgment on matters that the faculty considers its professional prerogative. As the economist Seymour Harris points out, "They [the faculty] do not accept orders from the administration on such matters as curriculum or the choice of faculty. If they did, the universities would soon lose their freedom and the uninhibited search for knowledge."[12] It may be worth noting that the very independence of faculty judgment - the discretion the profession has over its work that is the characteristic of professional status, was argued by the administration of New York University as rendering the faculty independent contractors instead of employees.[13]

From an historical perspective, it is quite clear that the faculty's role in institutional decision-making represents not a delegation of authority from higher to lower rungs in a managerial hierarchy, but a *concession* by employing institutions to the demands of employed professionals for a necessary degree of independence in professional service. The various faculty senates, councils, and committees are devices whereby the faculty's independent judgments are brought to bear upon the institution's managerial hierarchy.[14] Nor is higher education unique in this regard. "[M]ultilateral determination through colleague relations"[15] on matters considered by professionals to be a matter of professional - not managerial - prerogative arise in industrial research,[16] institutional medical practice,[17] and architectural practice,[18] to select but a few; again, as Freidson points out, such participation is characteristic of professional service:

> Management exercises direction by the use of its exclusive power to allocate the resources necessary for the work, indeed, the very existence of the jobs of the rank and file. The faculty may "plan" the curriculum, but "planning without a decision to commit human and fiscal resources is not a plan; it is only a review, a study, or an intellectual exercise" . . . . Faculties may propose, but the administration disposes. Faculties may be the only ones competent to lay out the choices, but it is the administration that chooses. That is where the generic fault line between rank and file and management lies in universities and in other organizations producing professional services.[19]

The Yeshiva Court acknowledged the claim that in recommending policies that, in industry, would be managerial, the faculty is merely exercising an independent professional judgment; but it chose to frame the issue purely in terms of the industrial analogy, as implicating the need for undivided loyalty between the employer and those who formulate its policies. Having done so the Court went on:

> The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy. It may appear, as the Board contends, that the professor performing governance functions is less "accountable" for departures from institutional policy than a middle-level industrial manager whose discretion is more confined. Moreover, traditional systems of collegiality and tenure insulate the professor from some of the sanctions applied to an industrial manager who fails to adhere to company policy. But the analogy of the university to industry need not, and indeed cannot, be complete. It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies. The large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.[20]

Two observations are apposite, one practical, the other going to the theory embraced by the Court. First, if collective bargaining produced situations where the faculty's ability to perform its functions in intramural policy formulation was impaired - because of "divided loyalty" or otherwise - one would have thought the Court would advert to such situations. After all, collective bargaining had been going on in higher education for over a decade and there was a substantial body of research on its effects. But instead the Court expressly disclaimed that it was to be guided by the utility or disutility of bargaining,[21] and so chose to blind itself to a large body of empirical evidence that ran counter to its assumption.

Second and perhaps more important, the whole thrust of the Court's theory rested upon the application of the industrial analogy; and if the industrial analogy does not - in the Court's words, "cannot" be applied, then the industrial assumption upon which the whole theory rests is negated. Let me illustrate by what I thought a useful hypothetical when asked to comment upon Yeshiva shortly after it had come down:

> Assume that there is an institution where the faculty has no voice in the fashioning of educational policy; that is, where the faculty . . . members were not managers. Assume further that that faculty elects a union and bargains for a system of committees and the like that gives them a voice in the development of educational policy. In order to be fully consistent, the Court would have to hold that once that role is secured -- even by collective agreement -- the employees become ousted of the Act's protection. But that would make no sense at all, for it is perfectly

> clear that these employees . . . perform functions as a result of management's concessions to their claims; they do not act on the employer's behalf but act in their own collective interest pursuant to a collective agreement.[22]

In fact, the labor Board later reached just that result, on exactly those facts:

> The Yeshiva decision does not expressly or impliedly distinguish situations in which managerial authority was gained through collective bargaining from situations in which such authority was more freely granted, and we do not believe that such a distinction is required by the Act. Accordingly, we must look to the extent of managerial authority held by college faculties rather than the manner in which such authority was obtained.[23]

In other words, were the Board to have concluded that concessions to professional employees did not render them managerial when the concessions were made as a result of collective bargaining, it would have placed in question whether concessions made in the absence of a "formal" bargaining relationship would not have the same legal effect. But such a result would challenge the very assumption upon which Yeshiva rests.

The consequences have been devastating to the rights of faculty members in private higher education, and are pregnant with larger consequences for the millions of employed professionals in the current and future workforce. On the former, the faculties of over twenty institutions have either been frustrated in their formal efforts to secure bargaining rights or, in a number of instances, have lost bargaining rights and found themselves no longer governed by the security of collective bargaining agreements, as in the recent case of Boston University. A partial list is appended at the close of this Statement. We do not know how many faculties and other professional employees have declined to pursue rights under the Act because of the dim prospects of success under Yeshiva.

More important, and as a study commissioned by the Department of Labor points out, it is highly dubious that Yeshiva can be limited to faculties in higher education.[24] If institutionally employed physicians serve on committees that the labor Board characterizes as functioning beyond the scope of patient care, they may find themselves exempted from the Act on the strength of Yeshiva.[25] If a group of architects secure the agreement of the firm to set up committees to deal inter alia with efficiency, standards of performance, and the physical environment of the firm, as well as remuneration, one would be hard pressed to distinguish them as non-managerial under Yeshiva.[26] If symphonic musicians negotiate a collective agreement that secures to the musicians themselves effective control of contested decisions on renewal, tenure, seating, and discharge that turn upon musical competence,[27] one could not easily distinguish them from the faculty members in the College of Osteopathic Medicine and Surgery who lost their employee status because of just such concessions made in a collective bargaining agreement.[28]

In sum, the Act, as construed by the Supreme Court, bids fair to deny the statutory protections, afforded all other employees, to a large and growing segment of the workforce who find themselves increasingly bureaucratized and at least potentially needful of them. The only apparent recourse at this point is legislative. Professionals should be brought under the Act for what they are - as employed professionals, not managers. In so doing, I would urge you also to attend to the question of the scope of mandatory subjects of bargaining which perforce must be broader in the professional arena than the gloss given the Act in the industrial setting.[29]

Appendix

Bargaining Relationship in Private Universities and Colleges Denied or Terminated as a Result of the *Yeshiva* Decision

Ashland College, Ohio
Boston University, Massachusetts
Catholic University Law School, D.C.
College of Osteopathic Medicine, Iowa
Curry College, Massachusetts
Daemen College, New York
Drury College, Missouri
Duquesne University Law School, Pennsylvania
Fairleigh Dickenson University, New Jersey
Ithaca College, New York
Lewis University, Illinois
Livingstone College, North Carolina
Mount Vernon College, D.C.
Polytechnic Institute of New York, New York
Salem College, West Virginia
Seattle University, Washington
Seton Hall University, New Jersey
Stephens College, Missouri
Stevens Institute of Technology, New Jersey
Thiel College, Pennsylvania
University of Albuquerque, New Mexico
University of New Haven, Connecticut
Wagner College, New York

Yeshiva University, New York

Source: National Center for the Study of Collective Bargaining in Higher Education and the Professions, DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS in INSTITUTIONS OF HIGHER EDUCATION Table 13 (January, 1987), and Washington Office, American Federation of Teachers and American Association of University Professors.

Notes

1. 1 U.S. Dept. of Commerce, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 Series D 233-682 at 140 (1975).

2. Silvestri & Lukasiewicz, A Look at Occupational Employment Trends to the Year 2000, 110 Monthly Lab. Rev. 46 (Sept. 1987).

3. Id.

4. See e.g. E. Hoffman, UNIONIZATION OF PROFESSIONAL SOCIETIES (Conference Bd. Rpt. No. 690) (1976), Sorensen & Sorensen, The Conflict of Professionals in Bureaucratic Organizations, 19 Admin. Science Q. 98 (1974).

5. In the case of medical residents and interns, the Labor Board held their status as graduate students precluded their being considered statutory employees. Ceders-Sinai Medical Center, 223 NLRB 251 (1976). Because that determination was not a final order of the Board, judicial review of the Board's decision was unavailable. Physicians National House Staff Ass'n v. Fanning, 542 F.2d 492 (D.C. Cir. 1980) cert. den. (1981). As then chairman Fanning argued in dissent, joined by the dissenting judges of the District of Columbia Court, the Board's decision is in conflict with the plain language of the Act. Id. at 505.

6. The impact of this assertion upon professional musicians was explored in Hearing on H.R. 3291 at H.R. 5107 Before the Subcommittee on Labor-Management Relations of the House

Education and Labor Committee, 98th Cong. 2d sess. (1985).

7. 444 U.S. 672 (1980).

8. Id. at 686 (emphases added).

9. E. Freidson, PROFESSIONAL POWERS: A STUDY OF INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 146-147 (1986).

10. T. Hungate, MANAGEMENT IN HIGHER EDUCATION 66-67 (1964).

11. H. Mason, COLLEGE AND UNIVERSITY GOVERNMENT 1 (Tulane Studies in Political Science, Vol. XIV) (1972).

12. S. Harris, HIGHER EDUCATION: RESOURCES AND FINANCES 632 (1962).

13. New York University, 205 NLRB 4 (1973).

14. See generally J. Baldridge, POWER AND CONFLICT IN THE UNIVERSITY 114 (1971).

15. W. Kornhauser, SCIENTISTS IN INDUSTRY 201-202 (1962).

16. Id. See also S. Marcson, THE SCIENTIST IN AMERICAN INDUSTRY 133 (1960): "The strains and conflicts in the authority system within which professional employees function in this industrial research organization lead it to adopt elements of the university system of colleague authority to its own needs."

17. See e.g. FHP, Inc., 274 NLRB 1141 (1985).

18. See e.g. Hertzka & Knowles v. NLRB, 502 F.2d 625 (9th Cir. 1974).

19. E. Freidson, PROFESSIONAL POWERS supra note 9 at 149-150 (emphasis added) (references omitted).

20. 444 U.S. at 689-690 (emphasis added).

21. *Id.* n. 29 at 689.

22. Finkin, *The Yeshiva Decision: A Somewhat Different View*, 7 J. College & Univ. L. 321, 324 (1980-81) (emphasis added).

23. College of Osteopathic Medicine and Surgery, 265 NLRB 295, 297-98 (1982).

24. U.S. Dept. of Labor, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION 66-68 (February 1987).

25. FHP, Inc. 274 NLRB 1141 (1985).

26. Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974).

27. *See e.g.* Master Agreement of the Milwaukee Symphony Orch. 1974-1977 §10.5 (tenured musician may have Music Director's dismissal order reviewed by a play committee whose decision is final and binding), Master Agreement of the Buffalo Philharmonic 1976-1977 Art. IX(D) (Auditioning Committee's Control of Reseating and Non-Renewal), Master Agreement of the National Symphony 1973 §6.05 (Player's Committee review of dismissal and demotion based upon musical deficiency).

28. College of Osteopathic Medicine and Surgery, *supra* note 2~~1~~3.

29. *Cf.* Feller & Finkin, *Legislative Issues in Faculty Collective Bargaining* in FACULTY BARGAINING IN PUBLIC HIGHER EDUCATION 74-183 (Carnegie Council Series) (1977).

Senator **Metzenbaum**. Thank you very much, Professor Finkin. I understand your approach with respect to the need for legislative change. Whether or not that is realistic at this point, I do not know, because once you open up this law, I think it would become a Pandora's Box. But we certainly will take a look at it and appreciate your thoughts.

Mr. Swan and Mr. Ragen, some have suggested that collective bargaining by professionals such as college professors and doctors will undermine the autonomy and the collegiality that should define professional work.

First of all, I have some difficulty with that thought myself, because in many instances, we know that college professors and doctors already have collective bargaining arrangements in some places.

But is there something distinctive as you see it about professional work that warrants a different approach to collective bargaining?

Mr. **Swan**. Well, actually, yes, maybe in a slightly different spirit than that. Obviously, collegiality is sort of a collective enterprise. We try and encourage it, and I would think that would actually increase the collegiality.

But I really think that professionals, who generally have a lot to offer their institutions can understand the viability of their institutions. Unfortunately with the present system, management feels that power problems are so important—and I do not think this is limited to Livingstone College—that faculty and other professionals frequently have almost no input into running the institutions.

Now, I do not mean to say I want the professionals to replace management, although that certainly is not an unspeakable conclusion; but rather, I think collective bargaining has a lot to offer in the sense that the professionals then would be in a position to offer constructive options to the institution and even publicize those.

For instance, we and many other institutions have a bigger constituency than just our management. For instance, at our college, we have a board of trustees, and then we have the larger part of the black community in the AME Zion Church that is also very concerned about the operation of the school. If we had collective bargaining, we could then inform these groups about what is taking place in the college so the college could perhaps better perform the mission for which it has been established, namely, providing a fair amount of competent black leadership. Many of us see our mission in the college is to educate these students so they can truly perform when they get out of the school.

I think this is true for technological firms as well. They have stockholders, and they have boards of directors as well as management. They do not always know what is going on in these firms. I read some criticism of General Motors just recently. It is conceivable that professional employees would be unionized—they may very well have that power in General Motors; I do not know—but they could offer advice as to how these institutions could better perform the jobs they are supposed to perform, because as professionals we tend to look at the broad picture, we tend to know many important and relevant details that many other people might not know. And I think we should have an opportunity to make a contribution to the organizations that we belong to, and I do not think the present system allows that to happen. We are treated, as I said in my statement, like plantation field hands, and that is sort of dumb, because we really have a better idea of how the system operates, and exchange of information in the modern day and age frequently improves the operation.

So I think really, professionals would really be helped by more collective bargaining, and I think the whole system would improve, if we had a clear, legally-defined right to bargain collectively and could conduct orderly elections, which seems not to be possible under the present situation.

Senator METZENBAUM. Thank you very much.

Mr. Ragen, did you want to respond to that question?

Mr. RAGEN. Well, I would like to echo Professor Swan's comments. I think we find that collective bargaining leads to better relations in the hospital and better patient care.

Three examples. In contracts we get positions for the residents on the medical board. That gives them a chance to bring up their concerns to the proper formats. That is a way they can be heard and speak up on patient care concerns.

There are other contract clauses that require there be enough support staff so that the residents can do their jobs. Another example is what is called the Patient Care Trust Fund. Residents in the City hospital system in New York put aside money that could have been used for their raises—it amounts to hundreds of thousands of dollars—and use that to buy equipment where there are shortages in the City hospital system, of which there are plenty.

So I think those are examples of the doctors using their union to speak out for the rights of their patients and to improve the care that their patients receive in the hospitals.

Senator METZENBAUM. Thank you very much.

Professor Finkin, in your concluding paragraph, you suggest that we should consider whether the scope of mandatory subjects of bargaining should be broader in the professional arena than in the more traditional industrial setting.

In what ways should the scope be broader for professional employees?

Professor FINKIN. For the same reason that professionals have been hard to fit into the scheme of the statute. Let me, if I can, plug that into your last question.

Many institutions which have collegial relations—and a faculty is almost a paradigm of a collegially-governed institution—the reason faculties resort to collective bargaining is to protect the institutions that they have achieved. It is reactive and protective. That is the conclusion, for example, drawn by the report of the Carnegie Commission in Higher Education.

Yet, under our labor law, the functioning of such bodies is considered a management function, and bargaining over the management of the enterprise or the way in which the enterprise is to be managed under our labor law, would be a permissive, not a mandatory bargaining subject. That is to say, an employer of professional employees can choose to bargain over such matters if it wants to, but it may not be compelled to do so. A union cannot insist on it.

Well, there are ways of getting around that. It has not proved, at least in collective bargaining agreements prior to *Yeshiva*, to be an insurmountable problem. But it would expedite professional collective bargaining if the statute were to be clarified, Senator, to ensure that for professional employees, the scope of their job interests is somewhat broader than the law placed on the Act in the blue-collar setting.

[Additional statements supplied for the record follow:]

STATEMENT OF THE AMERICAN FEDERATION OF TEACHERS
BEFORE THE
SUBCOMMITTEE ON LABOR
SENATE LABOR AND HUMAN RESOURCES COMMITTEE

The American Federation of Teachers is an organization of teachers and faculty members employed in institutions of higher education as well as in elementary and secondary schools. Approximately 80,000 of its 560,000 members are employed by institutions of higher education, and AFT locals represent higher education faculty in formal collective bargaining relationships at about 240 colleges and universities across the country. Some of these bargaining relationships are regulated by the National Labor Relations Act, and some are regulated by state labor relations acts, many of which are modeled on the federal law.

We are submitting this Statement in order to bring before the Subcommittee our profound concern over the fact that our members employed in private sector colleges and universities have been effectively cut off from the benefits of the National Labor Relations Act. We believe that the plight of the private sector professoriate under the Act, important by itself, is illustrative of the more general need for Congressional review of the Act's ongoing viability in the modern American workforce.

The belief in collective bargaining which led to the passage of the NLRA more than fifty years ago remains valid today. But if the Act's original purposes are to be applied to the workforce of the 80s and beyond, Congressional action is necessary. For as now applied, the NLRA is not only unavailable to college and university faculty members, we believe that it is also of little value to professional and white collar employees generally.

In this Statement we first briefly review the general experience of college and university professors under the Act. We then set forth the experiences of three of our higher education locals which we believe highlight the problems we confront.

COLLEGE AND UNIVERSITY PROFESSORS AND THE NATIONAL LABOR RELATIONS ACT: 1970 -1980

The National Labor Relations Board first took jurisdiction over higher education in 1970.[1] Colleges and universities resisted the efforts of their faculties to organize by arguing that the traditional faculty role in matters of academic governance made faculty members managers or supervisors ineligible for "employee" status under the Act.

For ten years, the Labor Board rejected these arguments, recognizing that in their governance role faculty members were fulfilling their responsibilities as professionals and were not functioning as representatives of management.[2] The Board's approach was well-summarized by then Board Member Kennedy:

> [T]he influence which the faculty exercises in many areas of academic governance is insufficient to make them 'managerial' employees. Such influence is not exercised 'in the interest of the employer,' but rather is exercised in their own professional interest. The

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[1] Cornell University, 183 N.L.R.B. 904 (1970)

[2] See e.g., C.W. Post Center of Long Island University, 189 N.L.R.B. 904 (1971); Northeastern University, 218 N.L.R.B. 247 (1975); New York University, 205 N.L.R.B. 4 (1973); Adelphi University, 195 N.L.R.B. 639 (1972).

> **best evidence of this fact is that faculty members are generally not held accountable by or to the administration for their faculty governance functions. Faculty criticism of administration policies, for example, is viewed not as a breach of loyalty, but as an exercise in academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedom. Conversely, university administrations rarely consider themselves bound by faculty recommendations.**

Northeastern University, 218 N.L.R.B. 247, 257 (Member Kennedy concurring).

Once Labor Board protection was extended, a substantial number of faculties sought and won bargaining rights under the Act. The Labor Board's assertion of jurisdiction over private sector higher education coincided with a heightened interest in collective bargaining in state supported colleges and universities. Where state legislation permitted it, faculties in the public sector were organizing as well. By the early 1970s, for example, the academic personnel at City University of New York and the State University of New York had organized as had the faculties of Rutgers University and the New Jersey State Colleges. Similarly, the faculties of Connecticut's University, its State Colleges and its Community Colleges were all organized. Similar organizing occurred in most states where legislation made it possible. By early 1979 about 86 private and 302 public institutions of higher education were engaged in formal collective bargaining relationships with their faculties. More than 130,000 professors were unionized.[3]

This interest in collective bargaining on the part of college and university faculty members was not hard to understand. Faculty members, like other employees, are concerned about their salaries and about job security. During the 1970s especially, this natural concern was heightened by a pronounced shrinkage of the economic resources available to higher education. [4] Faculty salaries had fallen behind the rate of inflation to a greater extent than for American workers generally.[5] University management was especially preoccupied with cutting budgets. Faculty members found themselves robbed of their individual bargaining power by a tight job market. Junior faculty members found their prospects for tenure bleak or nonexistent. These developments understandably exacerbated the natural tensions in faculty-administration relations, and faculty influence in the educational enterprise declined in the process.[6]

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[3] National Center for the Study of Collective Bargaining in Higher Education and the Professions, Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education, i-ii (1979. Since the Yeshiva decision, organizing has continued in the public sector.

[4] See, e.g., Kemerer and Baldridge, Unions on Campus, (1975):

> "As long as the number of students continued to increase every year, jobs were plentiful, salaries were rapidly rising, and institutions were expanding both their facilities and services. Now, however, the massive boom has leveled off, and job security and salary increases have become prime concerns of faculty and are contributing to widespread unionization."

For some of the literature discussing the economic status of higher education in the 1970s, see E. Cheit, The New Depression in Higher Education, (1971); W. Jellema, From Red to Black? The Financial Status of Private Colleges and Universityes (1973) Kemeny, The University in Steady State, Daedalus, 87 (Winter, 1975).

[5] During the seventies faculty salaries increased at a slower pace than the salaries paid to American workers generally and did not keep pace with inflation. As of the 1978-79 academic year, real faculty salaries, adjusted for inflation, were 13.6 % below their 1972 levels. Hansen, "An Era of Continuing Decline: Annual Report on the Economic Status of the Profession, 1978-79," 65 AAUP Bull. 319,323-324 (1979). See also Dorfman, "Report on the Economic Status of the Profession 1976-1977," 63 AAUP Bull. 146, 148-149 (1977). Real faculty salaries experienced a "modest

It was in this climate that the Supreme Court issued its decision in *NLRB v. Yeshiva University*,444 U.S. 672 (1980). The Court set aside a Labor Board order requiring Yeshiva University to bargain with the union its faculty members had decisively elected to represent them. A five-Justice majority held that the faculty of Yeshiva University were "managerial employees," relying on the participation of faculty members in personnel decisions, curriculum decisions, and decisions relating to the establishment of systems for grading students, admission and matriculation standards, academic calendars and course schedules. The Court found that faculty recommendations were so generally followed that they "effectively determined" important decisions

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increase" in 1982-83, but remained constant in 1983-84. "Bottoming Out? The Annual Report of the Economic Status of the Profession, 1983-84," 70 AAUP Bull.3 (1984).

[6] "A number of critical changes--the weakened job market, less research funds, and the encroachment of outside pressure groups--have diminished faculty influence over decision processes in most institutions. These changes have resulted in restricted budgets, frozen salaries, the elimination of departments, and the execution of major decisions over the strong objections of faculties that feel increasingly impotent." J. Baldridge, *et al.*, *Policy-Making and Effective Leadership* 95)1978).

in these areas. The Court held this sufficient to deny the faculty the right to bargain with the protection of the National Labor Relations Act.

The Supreme Court in Yeshiva seemed oblivious to the realities of university life.[7] Its decision was predicated on an idealized view of the university, which does not comport with reality. As Justice Brennan put it in dissent:

> The Court's perception of the Yeshiva faculty's status is distorted by the rose-colored lens through which it views the governance structure of the modern day university. The Court's conclusion that the faculty's professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decisionmaking that is a vestige of the great medeival university. But the university of today bears little resemblance to the 'community of scholars' of yesteryear. Education has become 'big business,' and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same presures to cut costs and increase efficiencies that confront any large industrial organization. The past decade of budgetary cutbacks, declining enrollments, curtailment of academic programs, and increasing calls for accountability from alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decisionmaking process.

444 U.S. at 702-3 (Brennan, J. dissenting.)

Though arguably the Yeshiva decision was applicable only to those presumably few institutions whose faculties exert

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[7] The majority reached its result notwithstanding the fact that faculty members at Yeshiva were not hired as managers, and were neither evaluated nor held accountable for their participation in academic decision making. There was, moreover, no dispute that final authority was reposed in the University's administrative hierarchy and ultimately, of course, its governing board.

"absolute" control over academic policy,[8] it has in fact operated far more broadly. The decision has been construed by the Labor Board to confer managerial status on all faculties which play a significant role in curriculum matters such as the determination of course content, core curriculum requirements, grading standards, and the like.[9] Although governance structures and practices vary considerably among institutions, virtually all higher education faculties play a necessarily important, if not always decisive, role in such basic academic matters.

COLLEGE AND UNIVERSITY PROFESSORS AND THE NATIONAL LABOR RELATIONS ACT SINCE 1980: THREE EXAMPLES

Because of the Yeshiva decision and its broad construction by the Labor Board, faculty organizing in the private sector has come to a halt. In addition, a substantial number of long-established faculty bargaining representatives have had their bargaining rights stripped from them.[10] Set forth below are summaries of the dispiriting experiences of three AFT locals which sought unsuccessfully to secure or retain bargaining rights under the NLRA.[11]

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[8] As described by the Yeshiva majority:

> [The] authority [of the Yeshiva faculty] in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged and the location of a school.

444 U.S. at 686.

[9] See Livingstone College, 286 N.L.R.B. No. 124 (1987), where the Board held the faculty to be ineligible to engage in collective bargaining even though there was no tenure system,and the faculty had no input into salary or other personnel matters. The Board held the faculty to be "managerial" because of its "substantial authority with respect to curriculum, degree requirements, course content and selection, graduation requirements, matriculation standards, and scholarship recipients." 286 N.L.R.B. No. 124, sl.op. at 17.

1. College of Osteopathic Medicine and Surgery

In 1976 the faculty of the College of Osteopathic Medicine & Surgery in Des Moines, Iowa, elected an AFT local as its exclusive bargaining representative. The election was conducted by the Labor Board and followed a period of extraordinary friction and strife between faculty and administration. During the five years prior to the certification of the AFT local, the College President had abolished tenure, abolished the faculty handbook and drastically reduced the professional autonomy of faculty members as well as the overall role of the faculty collectively in academic governance.

By the time of the *Yeshiva* decision the faculty had negotiated two contracts with the College. These contracts reestablished the tenure system and codified the faculty role in a variety of governance matters. During the term of the first contract, the College resisted their obligations under the tenure provisions, forcing the Union to court and then arbitration over the matter.

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[10] More than twenty faculty unions have lost their bargaining rights as a consequence of the *Yeshiva* decision. National Center for Collective Bargaining in Higher Education and the Professions, DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUCATION Table 13 (January 1987)

[11] The facts set forth in these summaries are drawn from interviews with faculty members and other individuals with personal knowledge of the events described, and from a review of the official record of proceedings before the National Labor Relations Board.[11]

In February 1981, the College filed a Unit Clarification Petition with the Board, contending, on the authority of the Yeshiva decision, that the faculty bargaining unit consisted of managerial and supervisory employees. The NLRB granted the Unit Clarification Petition, ruling that the faculty were managerial employees and that the fact that the faculty's authority had been achieved through collective bargaining did not alter the result. College of Osteopathic Medicine & Surgery, 265 N.L.R.B. 295. The Board observed that in the event that the faculty lost its "managerial authority" along with the loss of its bargaining rights, it could petition the Labor Board anew.

According to local observers, the loss of bargaining rights has had important consequences:

-although the College administration purported to retain the negotiated tenure system, they have in at least two instances exercised their prerogative to terminate assertedly tenured faculty members without demonstrated cause;

-although the College at first indicated a committment to leave the procedures negotiated by the faculty in place, they have in fact refused to honor the provisions of the negotiated grievance procedure which provide for third party arbitration;

-following decertification of the union, faculty members established a faculty welfare committee in an effort to develop some input into the determination of salary and benefits, but this met with no response from the College administration. Salary increases are unilaterally awarded by the administration;

-since decertification there have been increasing instances of administration interference with faculty grading decisions, whereas under the contract there was a procedure established for resolving such matters;[12]

-faculty tenure and promotion recommendations are overruled much more often than previously, when the administration's actions were the subject of review through the contractual grievance procedure.

2. Seton Hall University

In the late sixties, the faculty voice at Seton Hall University became diluted. The faculty senate was eliminated in favor of a university senate which had representatives from the student body and administration, and other components of the University community, as well as from the faculty. In response to this perceived diminution of faculty influence, the Faculty Council was established as an all-faculty body charged with the responsibility to represent the faculty's interests exclusively.

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[12] This is a significant issue at this institution. The College is essentially a vocational school. The tuition is high, and the degree awarded is very valuable in terms of the career opportunities it offers. There is heavy pressure on faculty members to award passing grades, since failures result not only in lost tuition but also in a significant loss in career opportunity. For their part, faculty members feel interference in their grading of students to be an intrusion on their professional responsibilities. The contract vested fairly firm authority in the individual faculty member and created a vehicle for resolving disputes.

In the late sixties, prior to the Labor Board's extension of jurisdiction to higher education, the University voluntarily recognized the Faculty Council as the exclusive bargaining representative of the faculty. The Council and the administration thereafter negotiated agreements covering faculty salaries, a faculty grievance procedure and a variety of other matters of concern to the faculty.

By the early eighties, the faculty was becoming disenchanted with its ability to represent itself informally through the Faculty Council. Negotiations were at an impasse, and the University administration had taken a series of actions over strong faculty objection. There was substantial sentiment in favor of replacing the Faculty Council with a union affiliated with the American Federation of Teachers and with formal recognition under the auspices of the National Labor Relations Act.

In the late Spring of 1982, leaders of the Faculty Council approached the state affiliate of the American Federation of Teachers to seek help in getting Labor Board certification.

In April the newly chartered Seton Hall Faculty Federation, American Federation of Teachers, AFL-CIO petitioned the NLRB for an election. Because the agreement between the Council and the University was considered to operate as a bar to a representation election under the Board's contract bar doctrine,[13] it was necessary to file the petition almost immediately to bring it within the window period. In a word of mouth campaign conducted over the course of two and one-half days, Faculty Council leaders were able to secure authorization cards from more than forty-five percent of the faculty in support of the AFT local.

After initially indicating a willingness to agree to an NLRB-conducted election, the University reversed itself and decided to contest the petition by contending that all its faculty members were managerial employees under the rationale of the Yeshiva decision. Hearings before the Labor Board's Regional Director consumed seventeen days, beginning in June and ending in mid-November.

In October 1982, with the hearings before the NLRB Regional Director pending, a decisive majority of the faculty voted in favor of the Faculty Council's affiliation with the AFT local. Despite widespread faculty support for recognition of the newly affiliated Faculty Council, the University would agree to resume recognition of the Faculty Council only if the Council dropped its affiliation with the AFT.

In June of 1983, the Regional Director issued a decision finding that the faculty were unprotected managerial employees. The Regional Director recognized that "the role of the faculty in carrying out professional activities in and outside the classroom is clearly limited to utilizing their professional expertise or making routine recommendations within the policies established by the University." He also noted that the faculty had no significant control over "the establishment of new academic programs, the formulation of academic policies such as student retention or grading policies, the tuition level or the location of the school." He based his finding of managerial status on the faculty's role in personnel matters and on their role in determining course offerings, core curriculum and graduation requirements.[14]

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[13] See Morris, The Developing Labor Law 361 ff. (2d Ed. 1983)

Immediately after the release of the Regional Director's decision, the University's Board of Trustees met and made a series of sweeping decisions restructuring the University.

3. Livingstone College

The faculty of this historically black institution in North Carolina filed an election petition in late 1980.[15] The faculty association, affiliated with the AFT, had authorization cards from a substantial majority of the faculty. In February of 1981 the Regional Director issued a decision and direction of election. The election was conducted on March 26,1981, but the ballots were impounded pending review by the Board.

On November 30,1987, the Board issued a decision finding the faculty to be managerial employees on the authority of the Yeshiva decision. Livingstone College, 286 N.L.R.B. No. 124

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[14] Seton Hall University, Case No. 22-RC-8765 (June 7, 1983).

[15] See also, Statement of Frederick Swan, previously submitted to the Committee.

(1987)

The Board's decision rested almost entirely on its findings with respect to faculty authority to decide course content and related curriculum issues. As Frederick Swan, one of the leaders of the AFT local has already testified, the work of the faculty relied on by the Board for its decision is a necessary part of the professional responsibilities of a faculty member. This is underscored by Professor Swan's observation that only faculty members are competent to determine course content.

In fact, the Livingstone College faculty have virtually no impact on College governance and is very vulnerable:

-salary and benefits are a "total mystery," with no faculty input into the process, even at the level of the department chair;

-the College offers virtually no fringe benefits. Faculty members pay for their own health insurance;

-there is no tenure policy, and only one member of the faculty has tenure.

CONCLUSION

The construction of the NLRA imposed by the Yeshiva decision should be of concern to the Congress. First, of course, it denies coverage to college and university professors who have evinced a consistent interest in availing themselves of the benefits of collective bargaining. But the rationale of the decision sweeps well beyond the professoriate. By converting the exercise of basic professional responsibilities into managerial authority, the decision effectively truncates the rights of all professional employees under the Act.

Perhaps even more important, the equation of employee influence with managerial authority means that all employees are potentially faced with a choice between collective bargaining and consensual input into employer decisionmaking.[16/] This latter aspect of the Yeshiva decision is especially perverse. A basic goal of the National Labor Relation Act is to stabilize labor relations by encouraging increased employee influence through collective bargaining.[17/] The Yeshiva rationale turns the Act's basic goals inside out by withholding the Act's protections from employees who exert significant influence on their employer. This gives employers unwarranted power to avoid unionization under a smokescreen of benignity. As Justice Brennan put it in his dissenting opinon, the Yeshiva majority "permit[s] an employer to deny its employees the benefits of collective bargaining . . . merely by consulting with them . . . and accepting their advice when it is consistent with management's

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[16/] The Yeshiva rationale has been applied to professional employees other than college and university professors. See, Walla Walla Union Bulletin, Inc. v. NLRB, 632 F.2d 609,612-613 (9th Cir. 1980)(editorial page writer who, with other members of an editorial board, voted to choose editorial topics, held a managerial employee, citing Yeshiva.); FHP, Inc., 274 N.L.R.B. 1141 (1985) (Physicians serving on various governance committees excluded as management on the authority of the Yeshiva decision.).

[17/] See, e.g., H.K.Porter Co. v. NLRB, 397 U.S. 99,103 (1970) (The Act has established a "process [which] . . . ensure[s] that employees as a group [can] express their opinions and exert their combined influence over the terms and conditions of their employment."

own objectives." 444 U.S. at 700,n.11.

This can only serve to destablilize labor-management relations in the long run. As a recent study of the Department of Labor concluded, "employees will hardly be encouraged to participate in cooperative efforts with management if doing so will result in their exclusion from the bargaining unit." U.S. Dept. of Labor, U.S. Labor Law and the Future of Labor Management Cooperation 15 (1986). Similarly, union leaders can hardly be expected to participate in such cooperative relationships when they imperil the bargaining rights of their constituents.

We appreciate the opportunity to address the Subcommittee, and we would be happy to help in any way in an effort to formulate appropriate amendments to the National Labor Relations Act.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

22 February 1988

The Honorable Howard M. Metzenbaum, Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
430 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Metzenbaum:

The National Labor Relations Board has followed with great interest the oversight hearings before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources. Although the Board was not asked to participate in the hearings, we have been advised that the record will remain open through February 22 and that the Board is free to submit any additional facts which may shed some light on the Board's enforcement and administration of the National Labor Relations Act.

As indicated by the testimony of various witnesses who appeared before the Subcommittee, it is apparent that some cases, for a variety of reasons, including the complexity of the issues and the willingness of one or more of the parties to pursue all of the procedures which are built into the Act, extend beyond the median time for processing cases before the National Labor Relations Board. The NLRB administers the Act in a quasi-judicial manner, so that it is inevitable that a certain number of cases are going to be accompanied by formal hearings, remands at one level or another, court review, etc. -- all of which provide at least the potential for delay. It seems clear that Congress deemed such procedures essential to the fair administration of the statute and important in light of the obligations and rights accorded under the statute. The fact that a small number of cases result in delay should not obscure the fact that the overwhelming majority of cases -- both representation cases and unfair labor practice charges -- are processed and disposed of by the NLRB without formal litigation and without undue delay.

A fair and complete picture of the Board's role in administration of the Act will document the prompt manner in which most labor disputes are handled by the Agency. In FY 1987, the Agency processed more than 32,000 unfair labor practice cases and approximately 7600 election cases. Approximately one third of the unfair labor practice charges filed with the Agency are found to have merit. In nearly all cases an investigation is completed in about 30 days and if a meritorious case cannot be informally settled, a complaint is issued in a median of 45 days from the date of the charge. Formal litigation in which a case travels from the regional office, through a hearing before an administrative law judge, and on to the Board (and perhaps on to circuit court review) is the exception not the rule, as evidenced by the fact that the Agency has settled over 90% of the meritorious cases over the past 5 years.

We acknowledge that some cases which have come before the Board have not been processed in the expeditious manner we seek to maintain. It has been well documented elsewhere that the problems which arose from an unusual rate of turnover in Board membership led to an extraordinary backlog of pending cases at the Board level. Much progress has been made, however, in resolving this problem. From an all-time high of 1647 unfair labor practice and election cases pending in February 1984, the number has been reduced by 55% to 744 as of February 1, 1988. The Board issued 715 unfair labor practice decisions in Fiscal Year 1987. The median time taken to issue these decisions was not substantially reduced because the cases issued tended to be the older or more complex cases that comprise the Board's backlog. As the pending caseload approaches the historically acceptable level of 400-600 cases, we should be able substantially to reduce the time required to process cases.

In the area of representation cases, much has been said about the time taken to determine the question of whether employees desire to be represented by a union. Again, delay is the exception, not the rule. In more than 80% of the representation cases filed, an election is conducted promptly by agreement of the parties (i.e., the employer, the union or unions, and, in decertification petitions, the employee petitioner). In addition to agreeing to a prompt election, the parties themselves have worked out any differences with respect to such matters as appropriateness of the unit and voter eligibility. The median time from filing of petition to conduct of all elections is 48 days, including those where the election follows a hearing and a decision by the Regional Director or the Board. It should be noted also that election objections are filed in only 10% of the cases, so that in 9 out of 10 cases the election itself has provided a prompt answer to the question of whether employees desire union representation.

I note that Senator Harkin stated at the opening of the first day of the hearing that the NLRB had given up on being a fair intermediary. This Board's record on enforcement before the U.S. Courts of Appeals stands in stark contrast to this view. The historical percentage of court enforcement in full of Board decisions through Fiscal Year 1983 was 64%. The figure in FY 84 was 67%. In Fiscal Year 1985, the Board's unfair labor practice decisions were enforced in full by the courts in 84% of the cases. In FY 86 the figure was 75%; and in FY 87, 79%. This is an outstanding record of which this Board, I think, is justifiably proud, and which underscores the commitment of this Board to be the kind of fair intermediary which Senator Harkin and others have the right to expect.

On behalf of my colleagues at the Board, I wish to extend my thanks for providing the Board with the opportunity to provide the Subcommittee with these comments. The Board is, of course, available to provide you with any further information you may desire in connection with processing of cases before the Board.

Sincerely,

James M. Stephens

James M. Stephens
Chairman

PREPARED STATEMENT OF CAROL WAYBRIGHT, EMPLOYEE OF MODERN MANUFACTURING, INC. IN BUCKHANNON, WEST VIRGINIA

My name is Carol Waybright. I live in Buckhannon, West Virginia. I grew up and have lived there all my life.

Buckhannon is a small town of a few thousand residents. There are only three or four factories in the area, so competition for jobs is tough.

One of the plants in Buckhannon is Modern Manufacturing, Inc., a garment factory which is owned by Clifton Starkey. I started working for Modern Manufacturing in November, 1973 as a single needle machine operator. I was assigned to sewing labels on blouses, although later I was shifted to other sewing tasks. There were about 60-80 workers at that time, and we were all women except for a handful of male cutters.

I started working at the minimum wage; I'm not sure how much that was in 1973. I soon discovered that all of the other workers were also making the minimum wage, even those workers who had worked at Modern Manufacturing from the time it opened its doors in 1969 or 1970. We had no health benefits, no paid vacation, and no paid holidays.

Everyone was given the week of July 4 off, but we were not paid for it. Nor were we allowed to take vacation at any other time during the year. The only unpaid holidays we received were Thanksgiving, Christmas, and Memorial Day. Usually, we weren't even assured of having those days off until two or three days before the holiday. Fifteen years later, we are still working under the same conditions.

In 1973 (and still today) the factory was an unpleasant place to work, with no windows and no other real ventilation. In the winter, the Company piles rags against the doors to keep out the cold, making the doors hard to open. We have been lucky so far that there have not been any fires.

I knew that I wanted to improve our working conditions at Modern Manufacturing, but I didn't know what to do about it. But when a fellow worker called the International Ladies' Garment Workers' Union in 1978 and the Union started holding meetings, I became convinced that we needed a union. I attended two union meetings in March 1978, I signed an authorization card, and I asked other workers also to sign cards. With a union, we felt that we could make Modern Manufacturing a decent, human place to work.

But Modern's owner, Clifton Starkey, had other ideas. As soon as he found out about the ILGWU campaign, he did everything he could to stop it. He found out that I was one of the leaders of the organizing effort, so he fired me on March 24, 1978. Mr. Starkey had never fired any worker before.

Besides firing me, Mr. Starkey let go four other workers who supported the Union. Although I wasn't at the factory to observe the rest of Modern Manufacturing's campaign against the Union, my co-workers told me what Mr. Starkey was saying and doing. I heard that he threatened my co-workers that he would lay them off or close the factory if the ILGWU came in. He kept questioning the workers about whether they supported the Union, and he told them that even if the Union won, he would never give them anything in negotiations.

The Union had tremendous support from the workers; the overwhelming majority of them signed authorization cards. But Mr. Starkey scared the workers into thinking they would lose their jobs if the Union won the election. Even so, Modern Manufacturing only won the election held in July, 1978 by a couple of votes.

At this point, the ILGWU filed unfair labor practice charges with the National Labor Relations Board. I testified before an Administrative Law Judge to show that I was fired for union activity. It was two years after we had first tried to organize ourselves into a union when the Judge decided that we could have a union, and he ordered Modern Manufacturing in March, 1980 to bargain with our Union for a contract. He also ordered the Company to hire me and the other four workers back with full back pay. Mr. Starkey appealed the Judge's decision to the Board in Washington, D.C., which sat on the case for a year before agreeing in April, 1981 that we were entitled to have a union and to have our jobs back with back pay. Modern Manufacturing then appealed the Board's decision to a court, which enforced the Board's order in November, 1983.

Meanwhile, the Company took me back to work in July, 1980, but Mr. Starkey refused to pay me the back wages he owed me. I never thought I would see the money that Mr. Starkey owed me for firing me. But in 1984, I finally received a check for several thousand dollars. So, it took about six years from the time Mr. Starkey fired me for my union activity for me to get the back pay due me.

As soon as the court decided that Mr. Starkey had no choice but to negotiate with the ILGWU, the Union held a meeting to elect workers to the negotiating committee. All of the workers came to this meeting. I was elected to the negotiating committee along with four other workers. I was the only worker on the committee who had been working at Modern Manufacturing when the Union campaign started in 1978. In fact, almost none of the workers now at Modern Manufacturing had worked there in 1978.

We met with ILGWU representatives to put together our proposals for negotiations. Nothing had changed at the plant during the time I was gone from the factory or since that time. All of us were still working for the minimum wage, which by then was $3.35 an hour. We still had no health coverage, no paid vacation, and no paid holidays. We also still received only Thanksgiving, Christmas, and Memorial Day as unpaid holidays, with only a few days notice that the factory would be closed on those days. Unpaid vacation was still only permitted during the week of July 4. The factory still had no windows. In fact, nothing had changed since I had started at Modern Manufacturing in 1973.

In our proposals, we asked for wage increases, health benefits, and paid vacations and holidays. We asked for longer break times -- we had six minutes twice a day. We asked for a fair system of grievances and arbitrations, so that Mr. Starkey couldn't fire workers again for unfair reasons or otherwise treat us unjustly. We wanted respect and dignity at our jobs.

From June to November, 1984, we met several times with Mr. Starkey's attorney, Fred Holroyd. But we never got anywhere with him. He turned down every suggestion we made for wage increases, holidays, vacations, and health benefits. He told us that the Company would not be willing to increase its expenses by one penny. We knew that we were busy and that the work had been increasing steadily over the years, but Mr. Holroyd told us that there was no money for raises. He also insisted that Mr. Starkey be able to decide on everything without review by anyone -- either by the workers through the Union or by an arbitrator. For example, he demanded that the Company have an absolute right to decide which employees to lay off or recall. He also insisted that if Modern fired a worker without just cause, an arbitrator should not have the power to award back pay to that worker.

We kept limiting our proposals, trying to compromise with Mr. Holroyd, but he always said no. He agreed only to give us $3.35 an hour and overtime after 40 hours, which he has to do anyway by law. Finally, we asked him if we could have more advance notice of whether the factory would close on Thanksgiving, Christmas and Memorial Day, and he wouldn't agree to that at first either.

It was obvious that the meetings were getting us nowhere and were just a waste of time, so the ILGWU filed more unfair labor practice charges with the National Labor Relations Board. In December, 1985, a judge decided that Modern Manufacturing had bargained in bad faith, and he ordered the Company to bargain in good faith. Modern Manufacturing appealed to the Board in Washington and continued to refuse to bargain with us. Today we are still waiting for the Board to decide the case.

It is now ten years since we tried to organize ourselves into a Union to improve our working conditions. We still all work for minimum wage with no benefits. Just this year, Mr. Starkey waited until Tuesday, December 22 to tell us that we would have Christmas Day off. Of course, we weren't paid for Christmas. We worked on New Year's Day for $3.35 an hour.

For ten years, we have fought for our right to organize into a union. I still have hope that one day we will succeed in this effort. But until the law forces Clifton Starkey to deal with the Union and to treat us fairly, he never will.

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STATEMENT OF THE
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
ON STATE AND LOCAL COLLECTIVE BARGAINING
FOR THE RECORD
BEFORE THE
SUBCOMMITTEE ON LABOR OF THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

FEBRUARY 18, 1988

in the public service

The National Labor Relations Act has excluded all public employees, federal, state, and local, from its protections since its adoption in 1935.

After World War II, however, many state and local government workers and state and local government officials have developed their own collective bargaining systems. State and local legislation, executive orders, court rulings, and even attorney general opinions have established collective bargaining rights for state and/or local government workers in a wide variety of states.

During the 1960s and early 1970s, local government workers in many states achieved bargaining rights on a de facto basis with their local employers. Both sides agreed that stable representation and bargaining relationships were beneficial. Often these relations proceeded in the absence of formal authority. Once established in practice, they often ended up in personnel and civil service rules and regulations, and on occasion, even local ordinances. For reasons that included size, budgetary impact, ideological issues, political visibility, and the so-called sovereignty issue, states have been unwilling to proceed so informally. Meaningful collective bargaining on wages and economic issues for state employees has only been established through legislation. In early 1988 about one-half of the states, primarily those in the Northeast and Midwest, have well-established collective bargaining relationships in their cities, counties, school districts and with their own employees.

While some states have a single law covering all public employees, many states have several laws for the different groups of employees. For example, the smallest of our fifty states, Rhode Island, has one law for state employees, another law for municipal employees, a third law for fire fighters, still another for police and a fifth law for teachers. Each law is somewhat different. In a state where local *de facto* bargaining arrangements prevail, ground rules change in virtually every municipality and county in the state. [Attached to this statement is a chart on state and local collective bargaining arrangements. The chart is organized by state and presents information on the basic provisions of collective bargaining legislation.]

Despite the fact that the first collective bargaining law for public employees was passed in Wisconsin for local government workers in 1959, only twenty-six states have passed collective bargaining laws for the majority of their state and local employees. In four of the twenty-six states, the scope of collective bargaining for state employees is limited to conditions of employment. The large majority of collective bargaining laws establish the duty to collectively bargain between a public employer and an exclusive agent for all employees in an appropriate unit on wages, hours and other terms and conditions of employment. They include an independent administrative agency and procedures for unit determination and selection of an exclusive representative. Additionally, they specify a method for resolving impasses and may define unfair labor practices.

AFSCME's experience in the public sector has repeatedly shown that employees will freely choose to organize and join labor unions when they are able to select, free from coercion, their representative and are given the opportunity to engage in collective bargaining. A majority of public workers stand ready to work together in a union if that effort can make a difference in their lives. When a realistic collective bargaining and representational system is set up, they choose to use it overwhelmingly. For example, after the passage of the Ohio collective bargaining law, the number of state employees choosing union representation jumped from 10,000 to 40,000. Ohio is only our most recent example of an increase in workers seeking to be represented by a union after the passage of collective bargaining legislation. This experience has occurred in many other states.

AFSCME analyzed union representation patterns in an effort to determine the extent to which employees in the twenty-six states with collective bargaining rights have voted in favor of such union representation. The level of union representation in the twenty-six "pro-collective bargaining" states was measured against the twenty-four "anti-collective bargaining" states for the years 1976 through 1982, the most recent years for which accurate numbers were available. The differences were dramatic. In the twenty-six bargaining states, fully 71 percent of eligible employees were represented for collective bargaining in 1982. In the twenty-four non-bargaining states, only 14 percent were represented in 1982. Further, there was a consistent rise in union representation in the bargaining states and an equally consistent decline in the non-bargaining states between 1976-1982.

In the public sector, the passage of collective bargaining legislation has a similar effect on employer participation. When a state passes a collective bargaining law, state and local employers generally do not blatantly interfere with workers' right to organize. The employer tends to live with the policy of collective bargaining once it is mandated. On the other hand, where no law exists, there now, unlike the late 1960s and early 1970s, seems to be an incentive for the employer to violate even the workers' right of freedom of association. (We are prepared to document these violations to this Subcommittee.) Additionally, in bargaining states employer interference in the election process is infrequent, and first contracts are usually negotiated in good faith.

The non-bargaining state of Virginia provides an example of the impact of collective bargaining legislation upon level of union representation. Although there has never been collective bargaining for state employees in Virginia, during the early 1970s collective bargaining was accepted in numerous cities, counties, and school districts. In fact, many of the jurisdictions in Northern Virginia and the Tidewater area adopted ordinances providing for collective bargaining for their employees. At least nineteen local governing bodies, including Alexandria, Alexandria School Board, Fairfax County, Fairfax County School Board, Arlington County, Arlington County School Board, Norfork School Board and others, had entered into agreements with some or all of their employees.

Benefits from these collective bargaining relationships were evident. The jurisdictions' work forces became more stable: There was less turnover, and it was easier to recruit new employees. Labor-management relations were standardized and spelled out in memoranda of agreement. Personnel policy began to displace political influence in hiring, promotions, transfers, and layoffs.

However, in May 1976 the Virginia Governor directed the Attorney General to challenge the public sector bargaining relationships. Arlington County was chosen as the test jurisdiction because it contained examples of some of the different forms public employee unionization could take, and it was believed that a successful court challenge in that jurisdiction would provide a basis for nullifying bargaining of employee groups in all other jurisdictions. In Commonwealth v. Bd. of Supervisors of Arlington County, the state circuit court ruled that authority for the agreements was implied from the legislature's delegation of power to local governments to perform necessary services. However, the lower court's decision was appealed to the Virginia State Supreme Court which ruled in 1977 that without state legislation authorizing public sector collective bargaining all agreements were null and void. The level of local union representation in Virginia plummeted from 13 percent in 1976 to less than 1 percent by 1982.

More recently, in New Mexico last year the Attorney General issued an opinion repealing the right of state employees to even bargain over working conditions. AFSCME's membership in the state service fell by 40 percent almost immediately. In New Mexico the state agencies, especially the State and Highway and Transportation Department, knew through experience that collective bargaining could have a positive impact on labor-management relations. The Attorney General destroyed this historical relationship for his own ideological reasons. His language was so vehement that some AFSCME members actually thought that it had become illegal to join a union.

Ohio and Illinois provide two examples of the desire of people to make use of representation and bargaining legislation. Before 1982 in Illinois there was little collective bargaining on the local level and state employees had the right to bargain under an executive order. In Ohio most large cities and counties provided for collective bargaining through ordinances or it existed on a de facto basis, but state employees were not covered. Both Illinois and Ohio passed collective bargaining legislation covering all public employees in 1984. Between 1982 and 1986 bargaining unit representation on the local level increased by over a third in Illinois. In Ohio the number of union represented state workers jumped from about 10,000 to over 40,000. These increases in Ohio and Illinois represent the effect of the passage of collective bargaining laws in 1984 on bargaining unit representation.

To the question: Does the legal atmosphere directly influence workers' attitude towards representation and bargaining? The answer is yes. We saw in Ohio how when state workers finally had an opportunity under the enabling state legislation to collectively bargain, the level of union representation quadrupled. In Illinois it increased as well. In Virginia and New Mexico when the opportunity for bargaining was repealed it fell.

In summary, workers will join unions when they are permitted to organize in an atmosphere free from coercion and intimidation. Government employees will organize into unions in even far greater numbers once they win collective bargaining rights. Workers obviously want a rational system to promote their own interests and to protect themselves from arbitrary and discriminatory actions by management.

The objectives of public sector unions and private sector unions are the same: to provide workers a voice in determining the economic and noneconomic conditions of their employment. This voice is best exercised at the negotiating table through collective bargaining. There is no greater expression of democracy in action.

APSCME RESEARCH DEPARTMENT/AG

February 1988 (revised)

STATE AND LOCAL COLLECTIVE BARGAINING ARRANGEMENTS[1]

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Alabama	Firefighters	Meet & confer	No	Wages & conditions of employment	None	Prohibited	
	Teachers	Meet & confer	No	Conditions of employment	None		
Alaska	State and Local[2]	Collective bargaining	Yes & No[3]	Wages, hours & conditions of employment	Mediation Arbitration*	Permitted**	Agency shop permitted (Statute)
	Teachers	Collective bargaining	No	Conditions of employment	Mediation Arbitration*	Permitted**	
Arizona[4]	None						Dues checkoff (state)

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[1] By statute, civil service law, constitution, charter, executive order and decisional law. Table does not include de facto collective bargaining arrangements.

[2] Coverage unless local legislative body opts out.

[3] State: Alaska Labor Relations Agency
Local: Dept. of Labor

[4] Some cities and counties have enacted comprehensive ordinances under which they may negotiate wages.

*See attached binding interest arbitration table.

**See attached right to strike table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Arkansas	None						Dues checkoff (state)
California	State Civil Service & Depart. of Education Teachers	Meet & confer[5]	Yes	Wages, hours & conditions of employment	Mediation	Permitted[6]**	Agency shop permitted (Statute)
	Local[7]	Meet & confer	No	Wages, hours & conditions of employment	Mediation	Permitted[6]**	Agency shop permitted (Statute)
	Employees of School & Community College Districts	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding	Permitted[6]**	Agency shop permitted (Statute)
	Employees of U. of C., Hastings College of Law, Cal. St. U. and Colleges	Meet & confer[5]	Yes	Wages, hours & conditions of employment	Mediation Factfinding	Permitted[6]**	Maintenance of membership permitted (Statute)
Colorado[8]	None						

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[5] In practice, employees have collective bargaining rights.

[6] Permitted under a May 13, 1985 State Supreme Court ruling.

[7] Some cities and counties have enacted comprehensive ordinances which provide for an independent administrative agency and an impasse procedure.

[8] Some cities and counties have charter amendments providing for collective bargaining.

**See attached right to strike table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Connecticut	State	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop automatic (Statute)
	Local	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop in contracts
	Teachers	Collective bargaining	Yes	Wages, & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop permitted (Statute)
Delaware	State & Local[9]	Collective bargaining	No	State: Conditions of employment only All others: Wages, hours and conditions of employment	None	Prohibited	Agency shop in contracts
	Teachers	Collective bargaining	Yes	Conditions of employment	Mediation Factfinding	Prohibited	
	Police Officers & Firefighters	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	
District of Columbia	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Arbitration[10]	Prohibited	Agency shop permitted (Statute)

[9] A municipality, city or town must elect to come under the Act. The state and counties are covered.

[10] Compulsory binding arbitration for compensation; PERB may impose procedures of its choice for terms and conditions.

*See attached binding interest arbitration table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Florida	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	
Georgia	Firefighters[††] (pop. +20,000)	Meet & confer	No	Wages, hours & conditions of employment	Factfinding	Prohibited	
	State					Prohibited	
Hawaii	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Permitted**	Agency shop automatic (Statute)
Idaho	Firefighters	Collective bargaining	No	Wages & conditions of employment	Factfinding		
	Teachers	Collective bargaining	No	Wages & conditions of employment	Mediation Factfinding		

[††] Coverage only if the municipality opts to be covered by the Act.

*See attached binding interest arbitration table.

**See attached right to strike table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Illinois	State & Local[12]	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Permitted**	Agency shop permitted (Statute)
	Education Employees	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding	Permitted**	Agency shop permitted (Statute)
Indiana	Teachers	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	
Iowa	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Maintenance of Membership (State) (State Reorgan. Act)
Kansas	State & Local	Meet & confer	Yes	State: Hours & conditions of employment only All others: Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	
	Teachers	Duty to bargain	No	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	

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[12] Not applicable to units of local government employing less than 35 employees, except with respect to bargaining units existing on the effective date of the Act.

*See attached binding interest arbitration table.

**See attached right to strike table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Kentucky[13]	Firefighters[14] (pop. +300,000)	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	Agency shop permitted (Statute)
	Police[15] (pop. +300,000)	Collective bargaining	No	Wages, hours & conditions of employment	None	Prohibited	
Louisiana	None						Dues checkoff (all)
Maine	State	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop in contracts
	Local & Teachers	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop in contracts
	University Employees	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	

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[13] Some cities and counties have enacted comprehensive ordinances providing for collective bargaining.

[14] Population of 300,000 or more or any city that petitions to be included under the Act.

[15] County population of 300,000 or more and has adopted the merit system.

*See binding interest arbitration table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Maryland[16]	Teachers	Collective Bargaining	No	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	Agency shop permitted in some counties[16.5] (Statute)
	Non-certificated School Employees	Collective bargaining	No	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	Agency shop permitted in some counties[16.5] (Statute)
	Park & Planning Commission Police Officers	Collective Bargaining	No	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	Agency shop permitted (Statute)
Massachusetts	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop permitted (Statute)
Michigan	State[17]	Collective bargaining	No	Wages, hours & conditions of employment (excl. merit)	Mediation Factfinding	Prohibited	Agency shop permitted (CSC Rules)
	Local	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop permitted (Statute)
Minnesota	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Arbitration*	Permitted**	Agency shop permitted (Statute)

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[16] Dues checkoff for state employees.
Some counties and cities have enacted comprehensive ordinances providing for collective bargaining.

[16.5] Some counties provide automatic agency shop by ordinance.

[17] Under state civil service rules and regulations.

*See attached binding interest arbitration table.

**See attached right to strike table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Mississippi	None						
Missouri	All (except police and teachers)	Meet & confer	No	State: Conditions of employment only All others: Wages & conditions of employment (Determined by parties)	None	Prohibited	
Montana	All (except nurses)	Collective bargaining	No	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Permitted**	Agency shop permitted (Statute)
	Nurses	Collective bargaining	No	Wages, hours & conditions of employment	None	Permitted**	
Nebraska	All (except teachers)	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	
	State	Collective Bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding (Binding)	Prohibited	
	Teachers	Meet & confer	No	Conditions of employment	Factfinding		
Nevada	Local	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	

*See attached binding interest arbitration table.

**See attached right to strike table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
New Hampshire	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop in contracts
New Jersey	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop permitted (Statute)
New Mexico[18]	State[19]	Collective bargaining	No	Conditions of employment	Mediation Factfinding	Prohibited	Dues checkoff
New York	All[20]	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Prohibited	Agency shop automatic for state, permitted for local (Statute)
North Carolina	None					Prohibited	
North Dakota[21]	Teachers	Collective bargaining	No	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	

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[18] Some counties have enacted ordinances providing for collective bargaining.

[19] Under state personnel rules and regulations.

[20] Local governments can adopt their own procedures for the regulation of public employee labor relations provided they are "substantially equivalent" to the Taylor Act. This was done in New York City.

[21] State Mediation Act covers all public employees.

*See attached interest arbitration table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Ohio	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding[22] Arbitration*	Permitted**	Agency shop permitted (Statute)
Oklahoma[23]	Teachers & Non-Certified School Employees	Collective bargaining	No	Conditions of employment	Factfinding	Prohibited	
	Police & Firefighters	Collective bargaining	Yes	Wages, hours & conditions of employment	Arbitration[23.5]	Prohibited	
Oregon	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Permitted**	Agency shop permitted (Statute)
Pennsylvania	All	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Permitted**	Maintenance of membership permitted (Statute)

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[22] Factfinding recommendations can only be rejected by a 3/5 vote of either total membership of the union or the legislative body

[23] Some cities have enacted comprehensive ordinances providing collective bargaining rights.

[23.5] Although called arbitration, corporate authorities are authorized but not required to adopt the majority opinion of the arbitration panel.

*See attached binding interest arbitration table.

**See attached right to strike table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Rhode Island	State	Collective bargaining	Yes	Wages, hours & conditions of employment	Factfinding Arbitration*	Prohibited	Agency shop mandatory (Statute)
	Local	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Arbitration*	Prohibited	Agency shop in contracts
	Firefighters	Collective bargaining	Yes	Wages, hours & conditions of employment	Arbitration*	Prohibited	
	Police	Collective bargaining	Yes	Wages, hours & conditions of employment	Arbitration*	Prohibited	
	Teachers	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Arbitration*	Prohibited	Agency shop mandatory (Statute)
South Carolina[24]	None						
South Dakota	All	Collective bargaining	No	State: Hours & conditions of employment only All others: Wages, hours and conditions of employment	Conciliation	Prohibited	

[24] Automatic payroll deduction for dues to SC State Employees Ass.--revoked if group "resorts" to collective bargaining or encourages its 10,000 members to strike.

*See binding interest arbitration table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Tennessee[25]	Teachers	Collective bargaining	No	Wages & conditions of employment	Mediation Factfinding	Prohibited	
Texas	Police[26] & Firefighters[26]	Collective bargaining	No	Wages, hours & conditions of employment	Mediation Arbitration*	Prohibited	
	Teachers	Meet and confer	No	Conditions of employment	None	Prohibited	
Utah[27]	None					Prohibited	Dues checkoff (local)
Vermont	State	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	
	Local	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Permitted**	Agency shop permitted (Statute)
	Teachers	Collective bargaining	No	Wages & conditions of employment	Mediation Factfinding		

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[25] Dues checkoff for state employees.

[26] Coverage only in cities, towns and political subdivisions where collective bargaining has been approved by a majority of the voters.

[27] Some cities have enacted ordinances providing for collective bargaining.

*See attached binding interest arbitration table.

**See attached right to strike table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Virginia	None					Prohibited	
Washington	State[28]	Collective bargaining	No	Conditions of employment	None	Prohibited	Agency shop permitted (State Civil Service Law)
	Local	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Arbitration*	Prohibited	Agency shop permitted (Statute)
	Teachers	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	Agency shop permitted (Statute)
	Academic Employees (community colleges)	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation	Prohibited	Agency shop permitted (Statute)
West Virginia	None						Dues checkoff (all)

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[28] By state civil service law and executive order.

*See attached binding interest arbitration table.

State	Employee Coverage	Bargaining Rights	Indep. Admin. Agency	Scope of Bargaining	Impasse Procedure	Right to Strike	Union Security
Wisconsin	State	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding	Prohibited	Agency shop permitted (Statute)
	Local	Collective bargaining	Yes	Wages, hours & conditions of employment	Mediation Factfinding Arbitration*	Permitted**	Agency shop permitted (Statute)
Wyoming	Firefighters	Collective bargaining	No	Wages & conditions of employment	Arbitration*		

*See attached binding interest arbitration table.

**See attached right to strike table.

BINDING INTEREST ARBITRATION*

State	Voluntary (V): Both Parties Must Request Compulsory (C): Mandatory or Either Party or a Third Party May Request
Alaska	V: State, Local, Teachers C: Police, Firefighters, Correctional Officers, Hospital Employees
Connecticut	C: State, Local, Teachers
Dist. of Columbia	C: All[29]
Hawaii	V: All, except C: Police, Firefighters
Illinois	C: Police, Firefighters, Correctional Officers
Indiana	V: Teachers
Iowa	C: All
Maine	C: State, Local, Teachers, University Employees[30]

[29] Compulsory binding arbitration for compensation; PERB may impose procedures of its choice for terms and conditions of employment.

[30] Not binding on salaries, pensions and insurance.

BINDING INTEREST ARBITRATION* (con't.)

State	Voluntary (V): Both Parties Must Request Compulsory (C): Mandatory or Either Party or a Third Party May Request
Massachusetts	V: All
Michigan	C: Police, Firefighters, Emergency Medical Personnel, Emergency Telephone Operators
Minnesota	V: Nonessential employees C: Essential employees
Montana	V: All, except C: Firefighters
Nebraska	C: All
Nevada	C: Firefighters, Police
New Hampshire	V: All
New Jersey	V: All, except C: Police, Firefighters
New York	V: All, except C: Police, Firefighters

BINDING INTEREST ARBITRATION* (con't.)

State	Voluntary (V): Both Parties Must Request Compulsory (C): Mandatory or Either Party or a Third Party May Request
Ohio	C: Police, Firefighters, Emergency Medical Personnel, Emergency Telephone Operators, Employees of the State School for the Deaf and the State School for the Blind, Guards at Penal and Mental Institutions.
Oregon	V: All, except C: Police, Firefighters, Correctional Officers
Pennsylvania	V: All, except C: Police, Firefighters, Correctional Officers, Court Employees
Rhode Island	C: Police, Firefighters, State Police C: State[31] C: Local[32], Teachers[32]
Texas	V: Police, Firefighters

[31] Not binding on wages.

[32] Not binding on economic issues.

BINDING INTEREST ARBITRATION* (con't.)

State	Voluntary (V): Both Parties Must Request Compulsory (C): Mandatory or Either Party or a Third Party May Request
Vermont	V: Local
Washington	C: Police, Firefighters
Wisconsin	C: Local, Police, Firefighters, Teachers
Wyoming	C: Firefighters

RIGHT TO STRIKE

States with Right to Strike	Employees in Those States Without Right to Strike and Their Impasse Procedures	Employees in Those States With Right to Strike and Their Impasse Procedures	Comments
Alaska	Class 1: police and fire protection employees, jail, prison, other correctional institution employees, hospital employees.	Class 2: public utility, snow removal, sanitation, public school and other educational institution employees. May strike for a limited time. Time limit is determined by the interests of the health, safety or welfare of the public. Class 3: all other public employees.	Court may enjoin strike if it has begun to threaten the health, safety or welfare of the public. Court must consider "total equities" - not only impact of a strike on the public but also the extent to which employee organizations and public employers have met statutory obligations. After issuance of injunction, matter is submitted to arbitration.
	Mediation, compulsory binding arbitration	Mediation, voluntary binding arbitration	
California	Municipal fire fighters[33] Some cities and counties prohibit strikes for other municipal and county employees.	State and other local employees[34]	Right to strike through May 13, 1985 State Supreme Court ruling. (Los Angeles County Sanitation District District No. 2 vs. Los Angeles County Employees Assn., Local 660)
	Some cities and counties have enacted comprehensive ordinances which provide for an impasse procedure.	Mediation only or mediation and factfinding or mediation, factfinding and voluntary binding arbitration.	

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[33] State of California Labor Code.

[34] It is believed that the recent State Supreme Court decision concerning the county employees' right to strike will apply to all public ployees.

RIGHT TO STRIKE (CON't)

States with Right to Strike	Employees in Those States Without Right to Strike and Their Impasse Procedures	Employees in Those States With Right to Strike and Their Impasse Procedures	Comments
Hawaii	Fire fighters, police officers and essential employees. Essential employees: employees designated by the public employer to fill essential positions.	Other public employees.	If a strike which may endanger the health or safety of the public is about to occur or is in progress, the public employer may petition HPERB to investigate. If HPERB determines there is an imminent or present danger to health or safety of public, HPERB shall designate essential positions. Employer shall seek an injunction of an illegal strike.
	Fire fighters and police officers: Mediation, factfinding, compulsory binding arbitration. Essential Employees: Mediation, factfinding, voluntary binding arbitration.	Mediation, factfinding, voluntary binding arbitration.	

RIGHT TO STRIKE (CON'T)

States with Right to Strike	Employees in Those States Without Right to Strike and Their Impasse Procedures	Employees in Those States With Right to Strike and Their Impasse Procedures	Comments
Illinois	Police officers, fire fighters, and security employees. Security employees: one who is responsible for the supervision and control of inmates at correctional facilities, includes nonsecurity employees in bargaining units in which majority of employees are guards.	Other public employees	Ed. employees: If a strike is or has become a clear or present danger to the health and safety of the public, employer may apply to Court for an injunction. PLRA employees: If a strike is or has become a clear and present danger to the health and safety of the public, employer may petition Board to investigate. If Board agrees with employer, employer is required to designate the essential employees. Such employees may be ordered to return to work under specified conditions and for a limited duration. Dispute for such employees shall be submitted to binding arbitration.
	Police, fire fighters and security employees: Mediation, compulsory binding arbitration.	Mediation, factfinding, voluntary binding arbitration or a mutually agreed upon dispute resolution procedure.	

RIGHT TO STRIKE (CON'T)

States with Right to Strike	Employees in Those States Without Right to Strike and Their Impasse Procedures	Employees in Those States With Right to Strike and Their Impasse Procedures	Comments
Minnesota	Essential employees: fire fighters (includes salaried employees of a fire dept. where duties include directly or indirectly, controlling, extinguishing, preventing, detecting or investigating fires), peace officers subject to licensure, guards at correctional facilities, employees of hospitals, confidential employees, supervisory employees, principals, assistant principals. For state employees: essential employee means all law enforcement employees, health care professionals, correctional guards, professional engineering, and supervisory collective bargaining units, irrespective of severance, and no other employees. For U. of Minn. employees: essential employee means all law enforcement employees, nursing professional and supervisory units, irrespective of severance, and no other employees.	Nonessential employees	Under prior and less specific definitions of essential employees, the individual employee had to qualify as an essential employee. The fact that the employee worked in a dept. which provided essential services was not sufficient.
	Mediation, compulsory binding arbitration.	Mediation, voluntary binding arbitration.	

RIGHT TO STRIKE (CON'T)

States with Right to Strike	Employees in Those States Without Right to Strike and Their Impasse Procedures	Employees in Those States With Right to Strike and Their Impasse Procedures	Comments
Montana	Fire fighters	Other public employees	Nurses are not permitted to strike if there is another strike at another health care facility within a radius of 150 miles.
	Mediation, factfinding, compulsory binding arbitration.	Mediation, factfinding, voluntary binding arbitration.	
Ohio	Members of a police dept., fire dept. or state highway patrol, dispatchers employed by those agencies, deputy sheriffs, civilian dispatchers who dispatch police, fire, sheriff's dept. or emergency medical or rescue personnel, members of an exclusive nurses' unit, employees of the state school for the deaf or blind, employees of the public employee retirement system, corrections officers, guards at penal or mental institutions, specially appointed police personnel, psychiatric attendants, youth leaders at juvenile correctional facilities.	Other public employees	Upon petition of employer, strike may be enjoined by Court if the strike presents a clear and present danger to the public health and safety. Temporary restraining order may not exceed 72 hours. If injunction is issued, employer must contact Board and request that the strike be enjoined beyond 72 hours. If Board determines a clear and present danger exists, Court may further enjoin strike. Injunction will terminate in 60 days. No further injunction may be issued.
	Mediation, factfinding, compulsory binding arbitration.	Mediation, factfinding, or a mutually agreed upon dispute settlement procedure.	

RIGHT TO STRIKE (CON'T)

States with Right to Strike	Employees in Those States Without Right to Strike and Their Impasse Procedures	Employees in Those States With Right to Strike and Their Impasse Procedures	Comments
Oregon	Police, fire fighters, guards at correctional institutions or mental hospital.	Other public employees	If a present strike or an imminent strike creates a clear and present danger or threat to health, safety or welfare of the public, employer may petition Court for relief. If Court agrees, dispute shall be submitted to binding arbitration. "Danger or threat to the health and safety or welfare of the public" does not include economic or financial inconvenience to the public or the employer that is normally incident to a strike by public employees.
	Mediation, factfinding, compulsory binding arbitration.	Mediation, factfinding, voluntary binding arbitration.	
Pennsylvania	Police, fire fighters guards at prisons or mental hospitals, employees directly involved with and necessary to the functioning of the Courts.	Other public employees	If a strike creates a clear and present danger or threat to the health, safety or welfare of the public, employer shall seek Court relief, including an injunction.
	Mediation, factfinding, compulsory binding arbitration.	Mediation, factfinding, voluntary binding arbitration.	

RIGHT TO STRIKE (CON'T)

States with Right to Strike	Employees in Those States Without Right to Strike and Their Impasse Procedures	Employees in Those States With Right to Strike and Their Impasse Procedures	Comments
Vermont	(State employees do not have a legal right to strike under the separate law for state employees.)	Municipal employees	Employer may petition Court for an injunction if a strike which is occurring or is about to occur will endanger the health, safety or welfare of the public.
	(State employees: Mediation, factfinding)	Mediation, factfinding, voluntary binding arbitration.	
Wisconsin	Police, fire fighters (State employees do not have a legal right to strike under the separate law for state employees.)	Municipal employees (including teachers)	Employer or affected citizen may petition Court to enjoin strike during 10 day notice period that strike poses an immediate threat to public health and safety. If the Court agrees, it will issue an injunction and each party will submit a new final offer for binding arbitration.
	Police, fire fighters: Mediation, compulsory binding arbitration. (State employees: Mediation, factfinding)	Mediation, factfinding or mediation - arbitration or a mutually agreed upon dispute resolution. If both parties withdraw final offers prior to final and binding arbitration, employees may strike.	

Senator Metzenbaum. I want to thank all of the witnesses, including this last panel, for their participation today.

This hearing will continue next Friday. At this point, it stands adjourned.

[Whereupon, at 11:30 a.m., the Subcommittee was adjourned.]

NATIONAL LABOR RELATIONS ACT PRACTICES AND OPERATIONS

FRIDAY, FEBRUARY 5, 1988

U.S. Senate,
Subcommittee on Labor,
Committee on Labor and Human Resources,
Washington, DC.

The Subcommittee met, pursuant to adjournment, at 10:12 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy presiding.

Present: Senator Kennedy.

OPENING STATEMENT OF SENATOR KENNEDY

Senator **Kennedy**. We will come to order.

Today the Subcommittee on Labor conducts the second of two hearings on the National Labor Relations Act. Our focus today is on whether procedural delays available under the Act are being used unfairly to restrict the right of workers to organize and bargain collectively.

We have been working closely in examining these matters with Senator Metzenbaum, the Chairman of this Subcommittee, and I am pleased to have the opportunity this morning of chairing these important hearings.

Last week, the Subcommittee heard testimony that American workers want a chance to bargain with their employers to improve their working conditions. We heard that when given a free choice, without coercion and without intimidation, American workers will choose a collective bargaining arrangement.

The Subcommittee also heard disturbing testimony about workers who have no right to organize or bargain collectively under the current law and about the pervasive use of "union busting" tactics by employers who violate the spirit and perhaps the letter of the National Labor Relations Act.

Today we will consider the adequacy of procedures and remedies available under the Act. Rights are valuable only if they can be exercised fairly and in a timely manner, without fear of retaliation.

Last week, the Federal Court of Appeals in New York decided a case that had been in litigation for nearly five years. The Court found that workers had been unlawfully fired between the time they petitioned for a union election and the time of the election. But it should not take five years for workers to vindicate their rights to secure an untainted union election.

This morning, we will hear how delays in representation elections are used to undermine the right to organize and how other procedural delays are used to restrict the ability of organized workers to bargain with their employers.

We will hear first from workers who have been prevented from exercising their legal rights because of such delays. Finally, we will hear from distinguished scholars who have studied the effects of delay upon union organizing and collective bargaining.

Our first panel this morning consists of three individuals who will present their experiences and frustrations as working people trying to obtain representation by a union. We have with us Mr. Rick Reeves, Ms. Chris Majors and Mr. Kermit Beckwith. Would each of you please come forward?

We are grateful to you for coming this morning, and we look forward to your testimony.

I do not like the timer and the bells and lights, so we will not bother with them. We want to hear your stories and your statements, but if you can try and keep your testimony to six or seven minutes, we would appreciate that. Thank you.

If we could, we will start with you, Mr. Reeves.

STATEMENT OF RICHARD REEVES, ATLANTA, GA; CHRIS MAJORS, MISSION VIEJO, CA; AND KERMIT BECKWITH, TAMPA, FL

Mr. Reeves. Good morning. My name is Rick Reeves. I am currently employed as an organizer on the Service Employees International Union's Justice for Janitors organizing campaign in Atlanta, Georgia.

However, until November 3, 1986, I was a cook in the kitchen department at the All-American Gourmet, a frozen food preparer in Atlanta, then owned by General Host, but since sold to Kraft.

In November 1986, I was fired from my job at All-American Gourmet, allegedly for lack of productivity, but in reality because I had been one of the most open union supporters of the All-American Gourmet plant.

I have unfair labor practice charges on my discharge that are currently pending before the National Labor Relations Board. The Board's Atlanta Region, after conducting an investigation, has issued a formal complaint claiming that I was actually terminated because of my attempts to bring in a union.

The story of the All-American Gourmet campaign is an example of how even where employers do not drag out the election unit hearings or otherwise use stalling tactics to keep employees from organizing, the NLRB's procedures still make it impossible, even for a successful union, to actually get to the bargaining table.

All-American Gourmet is a story of a work force which goes through all the proper procedures to vote in a union, but are gone from the plant—or too cynical to care much anymore—by the time they are allowed to negotiate a first contract.

The All-American Gourmet campaign began in late 1985. The work force, almost all minority, decided to organize over issues related to salary levels, unfairness of disciplinary policies, and basic respect and dignity

The company, after it learned we were serious about wanting a union, held captive-audience meetings and tried to convince us that a union would not help us at all, and we would be foolish to vote one in.

But we were determined. On April 2, 1986, the union—SEIU—filed its petition for an election at the Board. The parties stipulated on April 30, 1986 to the appropriate unit, and an election was conducted on May 23, 1986. The union won by a vote of 201 to 131.

The company, however, filed objections charging that union supporters had engaged in election day campaigning in an area too close to the polling site and other similar charges. The NLRB regional director promptly investigated the objections and found them totally without merit. He recommended that they be dismissed in their entirety. On July 15, 1986, the company appealed to the Board in Washington.

For over eight months, the parties heard nothing. Finally, on March 5, 1986, the Board issued a one-page summary decision ordering that the Regional Director go back and schedule a hearing on the employer's objections. The earliest date we could get for this was May 12, 1987, before an NLRB Administrative Law Judge.

Which brings us to the present. Eight months later, we still await an ALJ decision. We still await Board certification of our election victory of 21 months ago. We still await the opportunity to sit at the table with the company and present and discuss proposals for our first collective bargaining agreement.

Meanwhile, who is the "we" that is left? Average wage of All-American Gourmet is about $5.50 to $6.00 an hour, with poor fringe benefits. In a low-paid work force like this, turnover is normally high. And here, with the additional frustrations of unionization delays, only about a third of the 400 or so original election day voters remain on the job.

Of the 25 individuals, including myself, who first circulated a union petition among coworkers in late 1985, only six are left. So if and when the Board finally lets us go to the bargaining table, it is questionable as to how many of the original "we" will still be there.

Those who still work at All-American Gourmet have done everything possible to keep their spirits up and to try to educate new workers about the advantages of having union representation. But as more and more time elapses, with absolutely nothing to show for having played and won strictly by the rules, it is hard not to be very angry, frustrated, and cynical about the rules and about the way that those rules are administered.

It is hard not to wonder if the company was right in those captive audience meetings after we first started organizing, when it said a union would not do anything for us here even if we won the election.

Thank you.

Senator KENNEDY. Thank you, Mr. Reeves.

[The prepared statement of Mr. Reeves follows:]

Testimony of Rick Reeves
Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources,

February 5, 1988

Good Morning:

My name is Rick Reeves. I am currently employed as an organizer on the Service Employees International Union's Justice for Janitors organizing campaign in Atlanta, Georgia. However, until November 3, 1986, I was a cook in the kitchen department at the All-American Gourmet, a frozen food preparer in Atlanta, then owned by General Host Corp., but since sold to Kraft.

In November, 1986, I was fired from my job at All-American Gourmet, allegedly for engaging in horseplay and for lack of productivity, but in reality because I had been one of the most open and active supporters of a union organizing drive among the Company's 400 production and maintenance employees that began in late 1985. I have unfair labor practice charges on my discharge that are currently pending before the NLRB. The Board's Atlanta Region, after conducting an investigation, has issued a formal complaint claiming that I was actually terminated because of my attempts to bring in a union.

The story of the All-American Gourmet campaign is an example of how even where employers do not drag out the election unit hearings, or otherwise use stalling tactics to keep employees from organizing, the NLRB's procedures still make it impossible, even for a successful union, to actually get to the bargaining table. All-American Gourmet is a story of a workforce which goes through all the proper procedures to vote in a union, but are gone from the plant -- or too cynical to care much any more -- by the time they are allowed to negotiate a first contract.

The All-American Gourmet campaign began in late 1985. The workforce, almost all minority, decided to organize over issues related to salary levels, unfairness of disciplinary policies, and basic respect and dignity. Throughout the workforce there were widespread complaints of broken promises on wage increases. Many of the lowest-paid $5.00 and $6.00 per hour workers were told at the time they were hired that they would be raised up to $10.00 by the end of their first year: they got nothing. Others complained that many of the supervisors were arbitrary and discriminatory in their treatment of some, while sharing blatant favoritism toward a chosen few. There were also basic fears about job security, since there were no clear, established standards of acceptable job performance whatsoever.

The Company, after it learned we were serious about wanting a union, held captive audience meetings and tried to convince us that a union wouldn't help us at all, and we would be foolish to vote one in.

But we were determined, and on April 2nd, 1986, the Union -- SEIU -- filed its petition for an election at the Board. The parties stipulated on April 30, 1986, to the appropriate unit, and an election was conducted on May 23, 1986. The Union won by a vote of 201 to 131.

The Company, however, filed objections charging that union supporters had engaged in election day campaigning in an area too close to the polling site and other similar charges. The NLRB Regional Director promptly investigated the objections and found them totally without merit. He recommended that they be dismissed in their entirety. On July 15, 1986, Company appealed to the Board in Washington.

For over eight months the parties heard nothing. Finally, on March 5, 1987, the Board issued a one-page summary decision ordering that the Regional Director go back and schedule a hearing on the employer's objections. The Board did not give any reasons whatsoever for its decision or for the delay in issuing its order. The earliest date we could get for this was May 12, 1987, before an NLRB Administrative Law Judge.

Prior to commencing the ALJ hearings, the Union was able to get the Company to agree on a number of measures to avoid further delay. The parties agreed, for example, that there would be no unnecessary postponements or continuances once the hearings started; that there would be no extension of time for filing briefs; and, most importantly, that there would be no appeal by either side from the ALJ's decision. The Company, incidently, has so far lived up to its promises and the hearings were completed with no significant delay, by late May. Briefs were filed in June, 1987.

Which brings us to the present. Eight months later we still await an ALJ decision. We still await Board certification of our election victory of 21 months ago. We still await the opportunity to sit at a table with the Company and present and discuss proposals for a first collective bargaining agreement.

Meanwhile, who is the "we" that is left? Average wage at All-American Gourmet is about $5.50 - 6.00 an hour, with poor fringe benefits. In any low-paid workforce like this, turnover is normally high. And here, with the additional frustrations of the unionization delays, only about a third of the 400 or so original election day voters remain on the job. Of the 25 individuals including myself who first circulated a union petition among co-workers in late 1985, only 6 are left. So, if and when the Board finally lets us get to the bargaining table, it is questionable as to how many of the original "we" will still be there.

Those who still work at All-American Gourmet have done everything possible to keep their spirits up and to try to educate new workers about the advantages of having union representation. But as more and more time elapses with absolutely nothing to show for having played and won strictly by the rules, it is hard not to be very angry, frustrated, and cynical about those rules and about the way that those rules are administered. It is hard not to wonder if the Company was right in those captive audience meetings after we first started organizing, when it said a union wouldn't do anything for us here even if we won the election.

Thank you.

(Note: The NLRB decision in the case of the All American Gourmet and the Service Employees International Union, Local 579, AFL-CIO, may be found at the end of the printed record.)

Senator KENNEDY Ms. Majors?

Ms. MAJORS. Good morning. My name is Chris Majors.

I have been a registered nurse at the Fountain Valley Hospital for the last five years. I am here today to tell you the experiences of the professional employees at our hospital in trying to form a union.

Some of the issues we were seeking to resolve were: chronic understaffing, concern for our patient safety, severe cuts in our benefits, and a lack of ability to equitably resolve these problems with management.

In May 1986, after realizing we could no longer individually improve our working conditions, we felt it was time to call in a union to help us to organize and present ourselves with a unified voice.

In our naivete, we believed that after a reasonable time, we could sit down with the hospital and negotiate a contract. Never once did we imagine that two years later we would still be engaged in a legal process that not only has not allowed us to negotiate, but is not even able to tell us whether or not we have a union.

As I sit before you, it is 21 months since our initial meeting, nine months since our election, and still we have no union, and there is no real end in sight.

In November 1986, we began passing out authorization cards. Within ten days, we had obtained signatures from a majority of the estimated bargaining unit. We believed we could take our cards to the Board, and because we had more than enough to qualify, they would notify the hospital and call for an election within a few weeks. We wanted to be fair and above-board and give everyone an opportunity to present their point of view.

Little did we know at that time we were handing our employer a loaded gun to turn against us through exploiting the legal system.

The first thing that the hospital did was to bring in West Coast Industrial Relations. This is a firm that claims a 95 percent success rate in keeping companies union-free. Many of their consultants are attorneys familiar with the intricacies of the Board rulings who use every trick and stalling tactic available to thwart the employees' efforts to unionize.

The first tactic they used was to challenge our bargaining unit. As a historical footnote, you should know that in 1981, our hospital had a union election in which its agent, West Coast, the hospital and UNAC came to an agreement on the bargaining unit. The election was lost at that time by only three votes.

In 1986, when we went to the Board with the same unit that was stipulated to in 1981, we felt there should be no objection. Obviously, West Coast planned to delay the election, and therefore would not agree to the previous unit. Instead, the employer claimed that many of the jobs previously recognized as non-professional somehow had become professional and should be included in the unit.

The employer knew that by making these claims the Board would have to rule on each disputed job, a process they knew could be quite lengthy.

The hearings began in December 1986 and concluded in January 1987. The direction of the election was not made by the Board until April 1st, 1987, almost five months after we filed our petition.

West Coast and the hospital vigorously used this time to subvert our organizing efforts. In January 1987, our staffing noticeably increased. At the same time, the hospital began hiring large numbers of new professional employees, most of whom were part-time or newly-graduated, unlicensed nurses, working on what is called an interim permit. These new employees were not only unfamiliar with the issues, but also were too new to understand our problems. Many had no hospital experience or had never worked at a facility as large as ours, so they felt that this was a great place to work.

In December 1986, we were told that we could not be given a raise due to the union campaign. Surprisingly enough, in February 1987, we were given the largest across-the-board wage increase since our last union campaign in 1981.

The most devastating tactic was the use of the captive audience meeting. If we didn't attend these meetings at our scheduled time, we were rescheduled until we did go. These meetings were initially very light in tone, but became increasingly anti-union in nature. They started out as informational, then quickly moved to subtle intimidation, then to overt fear and intimidation.

They first of all told us about how wonderful our benefits were. We heard about how unions don't work in the hospital setting; then how we would never be able to impact safe patient care, and how the union would put us on trial for minor infractions, and how violent our strikes would be.

The results were that the new employees and the veterans became very frightened of the process.

The culmination of these meetings was given by a West Coast consultant who informed the employees that the union would trade away our present benefits for dues check-off, union shop and on-sight representation. He said that all management had to do to bargain with us in good faith was to show up at the appointed place and at the appointed time and that a contract might never be reached.

After this meeting, we were invited to attend a movie about a union called "1199", a movie that had been edited down from 50 minutes to 15. This move depicted and highlighted unions and union officials as violent, destructive and strike-happy people.

Our election was finally held five and one-half months after our petition had been filed. Minutes before the polls opened, at the pre-election conference, the hospital presented a long list of nurses whose eligibility to vote was to be challenged. Interestingly, the bulk of these people were pro-union and had been identified as such in an informal poll conducted by management prior to the election.

The hospital challenged these ballots knowing the Board would take an indefinite period of time to investigate them. The preliminary election results showed that the union had won by four votes. During the election the hospital, through its managers, committed many infractions of the rules. Because of the closeness of our election and the large amount of challenge ballots, we felt we had no choice but to file objections. Another lengthy investigation followed.

The hospital, knowing it had bought an indefinite amount of time from the Board, then started a new campaign to stack the cards in their favor. Most noticeably, the staffing in all areas of the hospital markedly decreased. Some professionals were so harassed that in May and June, several unfair labor practice charges were filed on their behalf.

West Coast knew that the filing of these ULPs would delay the outcome of the election for months. The plan appeared to be to turn over the existing staff as quickly as possible and to replace them with new employees unfamiliar with our problems.

On September 30th, five months after the election, the Board informed us that four of the ULP charges were being dismissed and that if we did not appeal the dismissal, the decision regarding the challenged ballots would be given to us shortly, perhaps in 14 days. This "quick" decision came to us six weeks later, and only because we continually pressured the Board and our legislators.

However, the NLRB has yet to count our challenged ballots. Fountain Valley has appealed the regional decision to Washington. To protect ourselves, we too have appealed. It has now been two months since the appeal, and we have heard nothing.

We are now two years down the road from our initial decision to organize. We chose to organize because there were very real issues that we feel, and there are very real issues now that we feel can only be resolved through collective bargaining. These issues are timely and important.

The right to organize, however, is valueless if there are no guarantees in place that ensure that it can be accomplished within a period of time that supports the reasons for which it was begun.

Thank you.

Senator KENNEDY. Thank you very much, Ms. Majors.

[The prepared statement of Ms. Majors follows:]

PRESENTATION BY

CHRIS MAJORS, RN

BEFORE

THE SUBCOMMITTEE ON LABOR AND HUMAN RESOURCES

FEBRUARY 5, 1988

GOOD MORNING. MY NAME IS CHRIS MAJORS AND I AM A REGISTERED NURSE IN THE MATERNAL CHILD DIVISION AT FOUNTAIN VALLEY REGIONAL HOSPITAL AND TRAUMA CENTER IN FOUNTAIN VALLEY, CALIFORNIA. I AM HERE ON BEHALF OF THE PROFESSIONAL EMPLOYEES AT FOUNTAIN VALLEY TO TELL THE COMMITTEE OUR EXPERIENCE IN ATTEMPTING TO FORM A UNION.

SOME OF THE ISSUES WE WERE SEEKING TO RESOLVE WERE: CHRONIC UNDERSTAFFING, CONCERN FOR PATIENT SAFETY, SEVERE CUTS IN OUR BENEFITS, AND A LACK OF ABILITY TO EQUITABLY RESOLVE THESE PROBLEMS WITH MANAGEMENT. IN MAY 1986, WE FELT IT WAS TIME TO CALL IN A UNION TO HELP US ORGANIZE AND TO SPEAK WITH A UNITED VOICE.

IN OUR NAIVETE WE BELIEVED THAT AFTER A REASONABLE TIME WE COULD SIT DOWN WITH THE HOSPITAL ADMINISTRATION AND NEGOTIATE A FAIR AND REASONABLE CONTRACT. NEVER ONCE DID WE IMAGINE THAT TWO YEARS LATER WE WOULD STILL BE ENGAGED IN A LEGAL PROCESS THAT NOT ONLY HASN'T ALLOWED US TO NEGOTIATE OUR CONTRACT BUT ALSO ISN'T EVEN ABLE TO TELL US WHETHER WE HAVE WON THE ELECTION. AS I SIT BEFORE YOU IT IS 21 MONTHS SINCE OUR INITIAL MEETING - 9 MONTHS SINCE OUR ELECTION - 15 MONTHS SINCE OUR PETITION AND WE STILL HAVE NO UNION AND THERE IS STILL NO REAL END IN SIGHT. WE THINK THAT IT IS UNFAIR AND UNREASONABLE TO EMPLOYEES WHO WANT TO ORGANIZE AND FORM A UNION THAT THEY SOULD BE MADE TO WAIT FOR MANY YEARS IN ORDER TO ACCOMPLISH THEIR GOAL.

BETWEEN MAY, 1986 AND OCTOBER, 1986 OUR EMPLOYEE ORGANIZING COMMITTEE GREW FROM A HANDFUL OF NURSES TO 60 NURSES AND OTHER PROFESSIONALS. THESE 60 PEOPLE REPRESENTED OVER TEN PER CENT OF THE BARGAINING UNIT. PRO UNION SENTIMENT WAS STRONG AND WE BEGAN TO FEEL THAT THERE WAS HOPE THAT IMPROVEMENT OF OUR WORKING CONDITIONS WOULD BE REALIZED THROUGH COLLECTIVE BARGAINING. IN NOVEMBER, 1986 WE BEGAN PASSING OUT AUTHORIZATION CARDS. WITHIN 10 DAYS WE HAD OBTAINED SIGNATURES FROM A LARGE MAJORITY OF THE ESTIMATED BARGAINING UNIT EVEN THOUGH WE ONLY NEEDED 30%. WE BELIEVED THAT WE COULD TAKE OUR CARDS TO THE NLRB BECAUSE WE HAD MORE THAN ENOUGH TO QUALIFY AND THAT THEY WOULD NOTIFY THE HOSPITAL AND CALL FOR AN ELECTION WITHIN A FEW WEEKS. WE WANTED TO BE FAIR. WE WANTED TO HAVE EVERYTHING ABOVE BOARD AND GIVE EACH SIDE AN OPPORTUNITY TO VOICE ITS POINT OF VIEW. LITTLE DID WE KNOW THAT WE WERE HANDING OUR EMPLOYER A LOADED GUN TO TURN AGAINST US BY USING THE LEGAL SYSTEM AGAINST US. HERE WE ARE 18 MONTHS LATER WITH NO RESOLUTION.

THE VERY FIRST THING THAT FOUNTAIN VALLEY HOSPITAL DID WAS BRING IN WEST COAST INDUSTRIAL RELATIONS ASSOCIATION. THIS COMPAY CLAIMS A 95% SUCCESS RATE IN KEEPING COMPANIES UNION FREE. MANY OF THE CONSULTANTS WERE ATTORNEYS FAMILIAR WITH THE INTRICACIES OF THE NLRB'S RULINGS AND WHO USE EVERY TRICK AND STALLING TACTIC AVAILABLE TO THWART THE EMPLOYEES EFFORTS TO UNIONIZE.

THE FIRST TACTIC THAT THEY USED WAS TO CHALLENGE OUR BARGAINING UNIT. YOU SHOULD KNOW AS A HISTORICAL FOOTNOTE THAT IN 1981, FOUNTAIN VALLEY HOSPITAL HAD A UNION ELECTION IN WHICH THE HOSPITAL, ITS AGENT WEST COAST AND UNAC HAD COME TO A STIPULATED AGREEMENT ON THE BARGAINING UNIT. THAT ELECTION WAS LOST BY 3 VOTES. IN 1986 WHEN WE WENT TO THE NLRB WITH THE SAME UNIT THAT WAS STIPULATED TO IN 1981 WE FELT THAT THERE WOULD BE NO OBJECTION TO THIS UNIT. OBVIOUSLY WEST COAST PLANNED TO DELAY THE ELECTION SO THEY WOULD NOT AGREE TO THE SAME UNIT. INSTEAD, THE EMPLOYER CLAIMED THAT A NUMBER OF JOBS THAT PREVIOUSLY HAD BEEN RECOGNIZED TO BE NON-PROFESSIONAL SOMEHOW HAD BECOME PROFESSIONAL AND SHOULD BE INCLUDED IN THE UNIT. THE EMPLOYER KNEW THAT BY MAKING THESE CLAIMS THE NLRB WOULD HAVE TO RULE ON EACH DISPUTED JOB, A PROCESS THEY KNEW COULD BE QUITE LENGTHY. THE HEARINGS BEGAN ON DECEMBER 9, 1986 AND CONCLUDED ON JANUARY 14, 1987 ENCOMPASSING EIGHT DAYS OF SEEMINGLY ENDLESS TESTIMONY. THE DIRECTION OF THE ELECTION AND DECISION ON THE BARGAINING UNIT WAS NOT ISSUED BY THE NLRB UNTIL APRIL 1, 1987 ALMOST 5 MONTHS AFTER WE FILED OUR PETITION.

WEST COAST AND FOUNTAIN VALLEY REGIONAL HOSPITAL VIGOROUSLY USED THIS TIME TO SUBVERT OUR ORGANIZING EFFORTS. IN JANUARY, 1987 OUR STAFFING NOTICEABLY INCREASED. AT THE SAME TIME, UNDER THE DIRECTION OF WEST COAST THE FOUNTAIN VALLEY REGIONAL HOSPITAL BEGAN HIRING LARGE NUMBERS OF NEW PROFESSIONAL

EMPLOYEES, MOST OF WHOM WERE PART TIME OR NEWLY GRADUATED NURSES. QUITE A FEW WERE NOT EVEN LICENSED YET AND WERE WORKING ON WHAT IS CALLED AN INTERIM PERMIT. THESE NEW EMPLOYEES WERE NOT ONLY UNFAMILIAR WITH THE ISSUES, BUT ALSO WERE TOO NEW TO UNDERSTAND THE PROBLEMS. MANY HAD NEVER HAD ANY HOSPITAL EXPERIENCE OR THEY HAD NEVER WORKED IN A FACILITY AS LARGE AS FOUNTAIN VALLEY REGIONAL HOSPITAL. SO TO THEM FOUNTAIN VALLEY SEEMED LIKE A GREAT PLACE TO WORK.

ALSO COINCIDENTALLY, FOUNTAIN VALLEY REGIONAL HOSPITAL DECIDED TO IMPROVE THEIR COMMUNICATION WITH THEIR EMPLOYEES UNDER THE GUISE OF "THE HOTLINE." THIS HOTLINE WAS AN IN HOUSE ORGAN THAT WAS SUPPOSE TO BE A TRANSCRIPT OF ANONYMOUS TELEPHONE OR WRITTEN QUESTIONS WITH RESPONSES FROM THE HOSPITAL ADMINISTRATION. INSTEAD, WHAT IT TURNED OUT TO BE WAS ANOTHER VEHICLE FOR FOUNTAIN VALLEY REGIONAL HOSPITAL TO DISSEMINATE ANTI-UNION PROPAGANDA. MANY PRO UNION CALLS WERE NEVER RESPONDED TO WHILE ALL ANTI-UNION CALLS WERE ANSWERED IN DETAIL. THERE WERE A NUMBER OF "ANONYMOUS" EMPLOYEE QUESTIONS THAT WERE FAR TOO SOPHISTICATED FOR THE AVERAGE PERSON TO ASK. IN MY OPINION MANAGEMENT ARRANGED TO HAVE THESE QUESTIONS PUT INTO THE HOTLINE. THE HOSPITAL USED THIS VEHICLE TO DISSEMINATE ANTI-UNION STATEMENTS THAT IT OTHERWISE COULD NEVER HAVE MADE UNDER CURRENT NLRB REGULATIONS.

THE NEXT TACTIC USED WHILE WE WERE WAITING FOR AN ELECTION WAS TO GRANT THE LARGEST ACROSS THE BOARD WAGE INCREASE SINCE 1981 - THE LAST UNION CAMPAIGN. A 6% ACROSS THE BOARD WAS GIVEN TO ALL EMPLOYEES. WE WERE TOLD IN DECEMBER THAT WE COULD NOT BE GIVEN A WAGE INCREASE BECAUSE OF THE UNION, WE BELIEVE THAT THIS LARGE INCREASE WAS USED TO TRY TO INFLUENCE THE VOTE OF THE EMPLOYEES.

THE MOST DEVASTATING ANTI-UNION TACTIC WAS THE USE OF CAPTIVE AUDIENCE MEETINGS CONDUCTED BY THE EMPLOYER IN CONJUNCTION WITH WEST COAST. IF WE DIDN'T ATTEND WE WERE RESCHEDULED UNTIL WE DID GO. THESE MEETINGS WERE INITIALLY LIGHT IN TONE BUT BECAME INCREASINGLY ANTI-UNION IN NATURE. WE UNDERSTAND THAT THE EMPLOYER HAS THE RIGHT TO ALSO CONDUCT A CAMPAIGN BUT ON AN INFORMATIONAL BASIS ONLY. THE MEETINGS STARTED OUT AS INFORMATIONAL THEN QUICKLY MOVED TO SUBTLE INTIMIDATION AND THEN TO OVERT FEAR AND INTIMIDATION. WE HEARD ABOUT THE WONDERFUL BENEFITS WE HAD, HOW UNIONS DON'T WORK IN THE HOSPITAL SETTING, HOW WE WOULD NEVER BE ABLE TO IMPACT SAFE PATIENT CARE, HOW THE UNION WOULD PUT US ON TRIAL FOR MINOR INFRACTIONS, AND HOW VIOLENT OUR STRIKES WOULD BE. THE RESULTS WERE THAT THE NEW EMPLOYEES BECAME CONFUSED AND THE VETERAN EMPLOYEES BECAME FRIGHTENED OF THE WHOLE PROCESS. THE CULMINATION OF THESE MEETINGS WAS A MEETING GIVEN BY A WEST COAST CONSULTANT - A LARGE MAN WITH A TERSE, ABRUPT SPEAKING VOICE - WHO INFORMED THE EMPLOYEES THAT THE UNION WOULD TRADE

AWAY THEIR PRESENT BENEFITS FOR DUES CHECK-OFF, UNION SHOP, AND ON-SIGHT REPRESENTATION. HE SAID THAT ALL MANAGEMENT HAD TO DO TO BARGAIN IN GOOD FAITH WAS TO SHOW UP AT THE APPOINTED PLACE AND AT THE APPOINTED TIME AND THAT A CONTRACT MIGHT NEVER BE REACHED. HE ALSO TOLD US THAT WE COULD REACH AN IMPASSE AND IMPLIED THAT WHEN IT HAPPENED, THAT WE COULD AND WOULD LOSE BENEFITS THROUGH MANAGEMENT'S IMPLEMENTING THEIR FINAL OFFER. AFTER THIS MEETING, WE WERE INVITED TO ATTEND A MOVIE ABOUT A UNION CALLED 1199, A MOVIE THAT WEST COAST HAD EDITED DOWN FROM 50 MINUTES TO 15. THIS MOVIE DEPICTED AND HIGHLIGHTED UNIONS AND UNION OFFICIALS AS A VIOLENT, DESTRUCTIVE AND STRIKE-HAPPY GROUP.

IN APRIL WE RECEIVED THE NLRB DECISION AND AN ELECTION DATE. CAPTIVE AUDIENCE MEETINGS CONTINUED, THE HOTLINES CONTINUED. AS A RESULT OF THESE ANTI-UNION ACTIVITIES AND THE SUBSTANTIAL DELAYS WE HAD LOST SIGNIFICANT SUPPORT.

OUR ELECTION WAS FINALLY HELD ON APRIL 30 AND MAY 1, 1987 - 5 AND 1/2 MONTHS AFTER OUR PETITION HAD BEEN FILED. MINUTES BEFORE THE POLLS OPENED, AT THE PRE-ELECTION CONFERENCE, THE HOSPITAL, REPRESENTED BY WEST COAST, PRESENTED A LONG LIST OF NURSES WHOSE ELIGIBILITY TO VOTE WAS TO BE CHALLENGED. INTERESTINGLY, THE BULK OF THESE PEOPLE WERE PRO UNION AND HAD BEEN IDENTIFIED AS SUCH IN AN INFORMAL POLL CONDUCTED BY MANAGEMENT PRIOR TO THE ELECTION.

WEST COAST AND THE HOSPITAL CHALLENGED THESE BALLOTS KNOWING THAT THE NLRB WOULD TAKE AN INDEFINITE PERIOD OF TIME TO INVESTIGATE THESE CHALLENGED BALLOTS. THE PRELIMINATRY ELECTION RESULTS SHOWED THAT THE UNION HAD WON BY FOUR VOTES. FOUNTAIN VALLEY REGIONAL HOSPITAL THROUGH ITS MANAGERS AND REPRESENTATIVES COMMITTED SO MANY INFRACTIONS OF THE RULES LEAVING US NO CHOICE BUT TO FILE OBJECTIONS TO THIS CLOSE ELECTION, WHICH WOULD THEN ENTAIL YET ANOTHER LENGTHY INVESTIGATION BY THE NLRB AND DELAY OUR ELECTION RESULTS EVEN LONGER. AT THIS TIME A SPOKESPERSON FOR THE NLRB TOLD THE PRESS THAT THE RESULTS WOULD BE KNOWN IN 35 DAYS AND WE WERE MISTAKEN TO BELIEVE THAT IT WOULD HAPPEN WITHIN THAT TIME FRAME.

KNOWING THAT THEY HAD BOUGHT AN INDEFINITE AMOUNT OF TIME FROM THE NLRB BY CHALLENGING THE BALLOTS FOUNTAIN VALLEY REGIONAL HOSPITAL THEN STARTED A NEW CAMPAIGN TO STACK THE CARDS IN THEIR FAVOR. IMMEDIATELY AFTER THE ELECTION THE TONE IN THE HOSPITAL CHANGED. MOST NOTICEABLY, THE STAFFING IN ALL AREAS MARKEDLY DECREASED. SOME PROFESSIONALS WERE SO HARASSED THAT IN MAY AND JUNE SEVERAL UNFAIR LABOR PRACTICE CHARGES WERE FILED ON THE EMPLOYEES BEHALF. THROUGH PAST EXPERIENCE, WEST COAST KNEW THAT THE FILING OF THESE ULPS WOULD DELAY THE OUTCOME OF THE ELECTION FOR MONTHS. THE PLAN APPEARED TO BE TO TURN OVER THE EXISTING STAFF AS QUICKLY AS POSSIBLE AND TO REPLACE THEM WITH NEW EMPLOYEES UNFAMILIAR WITH THE PROBLEMS AT FOUNTAIN VALLEY.

ON SEPTEMBER 30 THE NLRB INFORMED US THAT 4 OF THE ULP CHARGES WERE BEING DISMISSED AND THAT IF WE DIDN'T APPEAL THE DISMISSAL, THE DECISION REGARDING THE CHALLENGED BALLOTS WOULD BE GIVEN TO US SHORTLY, MAYBE AS SOON AS 14 DAYS. SINCE THE HOSPITAL WAS CONTINUING ITS CAMPAIGN OF HARASSMENT WE RELUCTANTLY AGREED TO WITHDRAW OUR CHARGES HOPING TO SPEED THE COUNTING OF THE CHALLENGED BALLOTS AND THE RESOLUTION OF THE ELECTION.

WE FEEL THIS DECISION CAME AS "QUICKLY" AS IT DID BECAUSE WE CONTINUALLY PRESSURED THE NLRB AND OUR LEGISLATORS. HOWEVER, THE NLRB HAS YET TO COUNT THE BALLOTS. FOUNTAIN VALLEY REGIONAL HOSPITAL HAS APPEALED THE REGIONAL NLRB DECISION TO WASHINGTON. TO PROTECT OURSELVES WE TOO APPEALED AS A RESULT OF THEIR APPEAL. IT HAS BEEN 2 MONTHS SINCE THE APPEAL AND WE HAVE HEARD NOTHING. WE HAD BEEN ADVISED BY AN NLRB ATTORNEY THAT THIS PROCESS COULD TAKE FROM 2 - 3 MONTHS.

IT IS NOW 9 MONTHS SINCE THE ELECTION AND OVER 1 YEAR FROM FILING OUR PETITION AND ALMOST TWO YEARS SINCE OUR DECISION TO ORGANIZE WAS MADE. WEST COAST AND THE HOSPITAL HAVE EFFECTIVELY MANIPULATED THE LAW THROUGH THEIR STALLING TACTICS WITH THE NLRB TO DENY US, IN EFFECT, OUR LEGAL RIGHT TO ORGANIZE AND TO NEGOTIATE A COLLECTIVE BARGAINING AGREEMENT.

THE RIGHT TO ORGANIZE IS VALUELESS IF THERE ARE NO GUARANTEES IN PLACE THAT INSURE THAT IT CAN BE ACCOMPLISHED WITHIN A REASONABLE PERIOD OF TIME.

Senator KENNEDY. Mr. Beckwith?

Mr. BECKWITH. Thank you.

I am a sheet metal worker. For the last 18 months I have been involved in an organizing effort at Astron Mechanical. They install air conditioning and sewer piping. They are based out of Tampa, Florida, and they perform this work in commercial buildings throughout the State of Florida.

We filed for a statewide election in November. I have been with the company since October 1986.

Senator KENNEDY. Excuse me. "Statewide election" means in all of the plants in the State, does it?

Mr. BECKWITH. Yes, sir. When we file just a "job election", they usually throw it out and tell us, "No, you have to go statewide." So our leaders, knowing this——

Senator KENNEDY. How many plants are there?

Mr. BECKWITH. There were 12 to 15 job sites. We never did get an accurate total, not even up to the election day.

Senator KENNEDY. What are the numbers who would work in those different sites, do you have any idea? I mean, how many workers are we talking about?

Mr. BECKWITH. I have heard numbers from 100 to 120.

Senator KENNEDY. In each site, or all of them?

Mr. BECKWITH. All of them.

Senator KENNEDY. So about 120 sheet metal workers would be participating in the election.

Mr. BECKWITH. Yes, sir, they would be part of the unit. Of course, the company said that they wanted all the workers to participate in a union election. That meant they wanted the truck drivers, the secretaries, the timekeepers, the boss' wife, and whoever else they could get to walk up to the polling site.

The union filed an objection and wanted to determine that the sheet metal unit would be sheet metal workers who we would represent. The Board agreed to this unit. But the company in their wisdom, with their lawyers, decided they wanted to come to Washington to appeal that. This was another stalling tactic, as we see it. It gave them more time to coerce, harass and set up their anti-union campaign.

When they appealed to Washington, they received an extension. The election date was fixed for March 5th, finally. So they have had since November when we first filed the petition for an election, up to March when they finally set the election, to do their maneuvering.

Meanwhile, from the company's first knowledge of the union campaign in October, we were subjected to heavy-handed responses. Astron had meetings on the job called by the management. They said that if the union wins, we will close the doors, and you will not have a job.

As a volunteer organizer, I passed out pamphlets from the National Labor Relations Board, the NLRA Act, I guess, stating that these things were illegal that they were telling us that they would do.

They stopped paying semi-annual pay raises. Prior to this they would rate their employees as to their abilities and their skills and give them pay raises accordingly. They stopped this.

They ruled that we could not even talk on the job about the union campaign, about the union election; that if we did, we would be disciplined for breaking the rules. This was against the NLRA. We had the right to do that, so we were told.

The company fired a host of employees who they perceived as union supporters, myself included. One of the men that I worked with was transferred. As I started to say earlier, I started at the airport job. They thought we were just going to do the airport job as an organizing campaign. We surprised them, I suppose, with a statewide election. But at the time I went to work for them in October, I was interrogated as to my union affiliation. I was interrogated about other employees if they were union supporters. The very next day, I was transferred off that job, to get me off that job to where I would be away from those workers, from the work site, where they perceived that I was trying to organize their men.

Five weeks later, I was transferred again, this time 80 miles away, one way; 168 miles per day, I had to travel. Another man was transferred with me. He was in his early twenties and had no transportation. He had to ride in the back of a pickup truck in the dead of winter—I guess as punishment to show him that he had no protections.

We hung in there. We did the job at the Orlando Hotel. The job was winding down. When the job did finally wind down, some of the men were transferred to other jobs, which is traditional for this company. When one job winds down, they will be transferred to another. At this time, they stopped that procedure. If you were a union supporter or even perceived as one, you would not be transferred, you would be fired. They did this to me. I went to the company and asked them why—if it was because of my union activity or union support. Naturally, they denied it. And I said, well, you have want ads in the paper for sheet metal workers. Am I not a good worker? They acknowledge I was one of their best workers. And I said, well, I would like to have a job. They said all they could give me was a helper job. I said I would take that.

They asked me why I would take that, and I said because I wanted to be there when there was an opening for a sheet metal worker. A week later, they gave me a job. I guess I buffaloed them or whatever, but I wanted the job back, and I had the protection of the NLRA. They cannot fire me—so I thought.

They gave me a job with another union organizer, just him and me on this one job, to isolate us from the other workers.

That young man I was telling you about riding in the back of the truck in the dead of winter, he was perceived as a supporter because he worked with me. They had already identified me as a union organizer, a volunteer organizer. They took this young man, who could not even pay enough to keep his car running to get to work, and sent him 80 miles away from home to work, made him work under those conditions and then fired him. Then they called him at his house and asked him, "Well, what is the union doing for you now?"

I told those young men that they had protection under the law, that the company cannot do this, that it is against the law. We have our rights. Then the company calls them and says, "Hey, you are laid off. You do not have any money. You come back in line, and we'll take care of you."

The night before the election I was out campaigning for union support. That young man would not even look me in the eye. He was wearing an Astron cap. He said, "Please stay away from me. They'll take care of me. The union is doing nothing for me." He was completely turned around.

The union has filed at least a dozen charges about what the company is doing and has done. No complaints have been issued by the Board. There are no explanations given. The Board finally told us that they would likely consolidate all the election issues, with all the other unfair labor practice charges, since there were a lot of overlapping issues. The young men don't understand this when they are sitting in the unemployment line. They want to know why they are not protected. Why can the company do this, just because I wear a union shirt and want union representation? They want union training.

The company, out of 120 men, had one registered apprentice in our State. They do not even offer training to these young men. They exploit them. The protections that we perceive that we had by the Labor Board were non-evident.

One reason why the Union objected to the practice of lumping the unfair labor practices and election violations all into one is because every time there is a man laid off, a man fired, an unfair labor practice committed, we file another charge. That delays the whole system. It keeps pushing it back. It gives the company further time to commit more unfair labor practice actions against their men to get them back in line, not to want a union.

Indeed, this is exactly what happened. This put the union in an impossible situation. Do we allow the company to harass the members who they perceive are members who want a union, who want protection, who want collective bargaining, or do we forgo that and not protect them, because there does not seem to be any protection?

It is completely frustrating to the employees who were the targets of the company's anti-union campaign of intimidation and harassment.

The general counsel issued a complaint against Astron on October 29, 1987, although no hearing date was set. In it were charges filed in November of 1986, February, March, April, June, and July 1987. When the union filed the appeal to Washington over the charges that the region had dismissed, the region got another excuse for delaying a hearing even further. The union appeal was filed in mid-October. It took over two months for Washington to rule on that appeal.

Also, the union election has never been resolved. The election, ironically, 11 months ago today, was held. The results of that election were 34 for the union, 26 against, and 37 challenged ballots. It wasn't until November 1987 that the Regional Director finally ordered a hearing on the objections and the challenged ballots. This will be combined with the unfair labor practice charges. We still have no hearing date.

After the election, the challenges sat with the Board, and the company continued its anti-union campaign wage freezes and firings. We never got any information from the Board about why the case was not getting resolved.

Meanwhile, many of the jobs at Astron that were running back when we filed for the election have already been completed. Employees who were working on those jobs have been let go.

Before the union campaign, people were getting transferred, as I said before, to other jobs when one was finished. When the union campaign started, this changed. Now, the company lays off union sympathizers, at the same time advertising in the newspaper for sheet metal workers.

It doesn't seem to matter that the union files charges. Also true to its threats, Astron is closing out the sheet metal operation. Whereas it had over 100 sheet metal workers when we had the election last year, they now are down to about a dozen.

The men who worked at Astron and showed support for the union feel like they have been kicked in the teeth. We were told about protections around the NLRA. We could see the union filing unfair labor practice suits on behalf of us, but it did not get us anything.

The so-called protections seem nonexistent. Not only were we fired for our union activities, but we now have to go out into the workplace, where we are blacklisted. I have been told not even to apply at this shop—your name is known. You are a union organizer. You are a troublemaker. You will not get a job here at this company.

I have years of experience in sheet metal, but even more important is my training, the union training. I am marketable in the work place. I have the protection not only of the NLRA; I have the protection of my union. These men had no protection. There is no movement under the National Labor Relations Board, it seems. The process is so slow, it is inept. We may as well not have it.

I thank you for listening to me, sir. If you have any questions, I would be glad to answer them.

[The prepared statement of Mr. Beckwith follows:]

COMMITTEE ON LABOR AND HUMAN SERVICES
SUBCOMMITTEE ON LABOR
TESTIMONY OF BUTCH BECKWITH

HI. MY NAME IS BUTCH BECKWITH. I AM A SHEET METAL WORKER. FOR THE LAST EIGHTEEN MONTHS, I HAVE BEEN INVOLVED IN AN ORGANIZING EFFORT AT ASTRON MECHANICAL IN FLORIDA. IT IS WITH PLEASURE, AND A GREAT DEAL OF HONOR, THAT I AM HERE TODAY TO TELL YOU WHAT I SAW AND WHAT I LEARNED DURING THAT ORGANIZING EFFORT.

ASTRON MECHANICAL LOCATED IN TAMPA, IS AN EMPLOYER IN THE CONSTRUCTION INDUSTRY THAT FABRICATES AND INSTALLS AIR CONDITIONING, WATER DISTRIBUTION AND SEWAGE SYSTEMS THROUGHOUT THE STATE OF FLORIDA. MOST OF ITS WORK IS IN COMMERCIAL BUILDINGS. I FIRST WENT TO WORK FOR ASTRON IN OCTOBER 1986, WHEN THE COMPANY WAS HIRING FOR THE TAMPA INTERNATIONAL AIRPORT RENOVATION.

THE VERY FIRST DAY I WAS ON THE JOB, THE FIELD SUPERINTENDENT APPROACHED ME AND SAID HE HAD HEARD THE UNION WOULD TRY TO ORGANIZE THE AIRPORT JOB. HE ASKED ME IF I WAS A UNION MEMBER AND HE ASKED ABOUT ANOTHER EMPLOYEE, TOO. THIS WAS THE FIRST OF THE NUMEROUS INSTANCES IN WHICH I WAS A VICTIM OF ASTRON'S ANTI-UNION CAMPAIGN.

I WAS IMMEDIATELY TRANSFERRED FROM THE AIRPORT JOB, AND FIVE WEEKS LATER I WAS AGAIN TRANSFERRED TO A HOTEL JOB IN ORLANDO, 80 MILES AWAY. I COMMUTED DAILY. IT WAS WHILE I WAS WORKING AT THE HOTEL THAT THE UNION FILED THE ELECTION PETITION WITH THE NLRB. IT WAS FILED IN NOVEMBER 1986.

THE NLRB AGENT SAID THE ELECTION WOULD BE HELD WITHIN 6 WEEKS, AT THE LONGEST; YET IT WASN'T HELD UNTIL TWICE THAT TIME. THE UNION HAD PETITIONED FOR A STATEWIDE UNIT OF SHEET METAL WORKERS. THE COMPANY CONTESTED THE UNIT BY ARGUING THAT THE ONLY APPROPRIATE UNIT WOULD INCLUDE ALL ITS EMPLOYEES, WHICH WAS A UNIT THREE TIMES AS LARGE AS THE UNION REQUESTED. WE HAD A HEARING ABOUT THE SCOPE OF THE BARGAINING UNIT ON DECEMBER 11, 1986. THE COMPANY RAISED QUESTIONS ABOUT EVERYTHING IMAGINABLE, AND THEN SOME, AND MADE THE HEARING PRETTY LONG. THE NLRB FINALLY AGREED WITH THE UNION THAT A UNIT LIMITED TO SHEET METAL WORKERS WAS APPROPRIATE, EVEN THOUGH, THIS COST US A LOT OF TIME. EVEN AFTER THE REGION DETERMINED THE PROPER UNIT, THE

COMPANY TOOK ADVANTAGE OF ITS RIGHT TO APPEAL TO WASHINGTON. IN DOING SO, IT ASKED FOR, AND RECEIVED AN EXTENSION IN FILING ITS APPEAL. THE UNIT QUESTION WASN'T RESOLVED FOR ANOTHER MONTH. THIS BROUGHT US TO JANUARY. IT WASN'T UNTIL LATE JANUARY THAT THE ELECTION DATE OF MARCH 5 WAS FINALLY FIXED.

MEANWHILE, FROM THE COMPANY'S FIRST KNOWLEDGE OF THE UNION CAMPAIGN IN OCTOBER, WE WERE SUBJECTED TO ITS HEAVY-HANDED RESPONSES. ASTRON THREATENED TO CLOSE DOWN THE SHEET METAL OPERATION IF THE UNION WON, IT STOPPED PAYING THE SEMI-ANNUAL RAISES IT USED TO GIVE, AND THE COMPANY ALSO IMPOSED A RULE THAT WE COULDN'T TALK ABOUT THE UNION DURING THE WORK DAY, NOT EVEN DURING OUR BREAKS, AND THEY DISCIPLINED PEOPLE FOR BREAKING THE RULE. MOST IMPORTANT, THOUGH, THE COMPANY FIRED A HOST OF EMPLOYEES, INCLUDING MYSELF, WHO SHOWED SUPPORT FOR THE UNION.

ONE OF THE MEN I WORKED WITH AND WHO HAD SHOWN HIS SUPPORT FOR THE UNION, WAS FIRED BY ASTRON, BUT WAS RE-HIRED A SHORT WHILE LATER. WHEN I NEXT SAW HIM, HE HAD BEEN PROMOTED AND HE WOULDN'T EVEN TALK TO ME. THE MESSAGE TO ME, AND EVERYONE ELSE, WAS CLEAR: IF WE WOULD ABANDON THE UNION, THE COMPANY WOULD LOOK AFTER US. THE OTHER MESSAGE WAS THAT THE UNION WAS POWERLESS BECAUSE EVEN THOUGH THE UNION HAD FILED CHARGES ON BEHALF OF THOSE FIRED, NOTHIN HAD COME OF THEM.

THE UNION FILED AT LEAST A DOZEN CHARGES ABOUT WHAT THE COMPANY WAS DOING IN RESPONSE TO THE ORGANIZING CAMPAIGN. NOT ONLY WERE NO COMPLAINTS ISSUED UNTIL LATE OCTOBER, BUT WE GOT NO EXPLANATIONS ABOUT WHY OUR CASES WERE NOT BEING PROCESSED. SEVERAL MONTHS AFTER THE ELECTION, THE BOARD FINALLY TOLD US THAT THEY WOULD LIKELY CONSOLIDATE ALL THE ELECTION ISSUES AND ALL THE OTHER UNFAIR LABOR PRACTICE CHARGES SINCE THERE WAS A LOT OF OVERLAP IN THE ISSUES. THE UNION OBJECTED TO THIS METHOD OF PROCEEDING, BUT THE BOARD INSISTED.

ONE REASON WHY THE UNION OBJECTED IS BECAUSE ASTRON CONTINUED TO FIRE ANYONE THEY SUSPECTED FAVORED THE UNION. THIS MEANT THAT IF THEY FIRED SOMEONE AND THE UNION FILED UNFAIR LABOR PRACTICE CHARGES OVER IT, THE EARLIER CHARGES AND ELECTION MATTERS WOULD GET FURTHER DELAYED. INDEED, THIS IS EXACTLY WHAT HAPPENED. THIS PLACED THE UNION IN THE IMPOSSIBLE SITUATION OF HAVING TO FOREGO CHARGES OR SUFFER ADDITIONAL DELAY. THE BOARD'S APPROACH MAY BE WISE FROM THE POINT OF VIEW OF AN EFFICIENT HEARING, BUT IT COMPLETELY FRUSTRATED THE EMPLOYEES WHO WERE THE TARGETS OF THE COMPANY'S ANTI-UNION CAMPAIGN OF INTIMIDATION AND HARASSMENT.

THE GENERAL COUNSEL FINALLY ISSUED A COMPLAINT AGAINST ASTRON ON OCTOBER 29, 1987, ALTHOUGH NO HEARING DATE WAS SET. AMONG THE MATTERS INCLUDED IN IT WERE THE MANY SEPARATE CHARGES THAT THE UNION HAD RAISED IN CHARGES FILED IN NOVEMBER 1986, AND FEBRUARY, MARCH, APRIL, JUNE AND JULY 1987.

WHEN THE UNION FILED AN APPEAL TO WASHINGTON OVER THE CHARGES THAT THE REGION HAD DISMISSED, THE REGION GOT ANOTHER EXCUSE FOR DELAYING A HEARING EVEN FURTHER. THE UNION'S APPEAL WAS FILED IN MID-OCTOBER. IT TOOK OVER TWO MONTHS FOR WASHINGTON TO RULE ON THAT APPEAL.

ALSO THE UNION ELECTION HAS NEVER BEEN RESOLVED. THE ELECTION WAS HELD LAST MARCH, 11 MONTHS AGO TODAY. THE RESULTS WERE 34 FOR THE UNION, AND 26 AGAINST, WITH 37 CHALLENGED BALLOTS. IT WASN'T UNTIL NOVEMBER, 1987, THAT THE REGIONAL DIRECTOR FINALLY ORDERED A HEARING ON THE OBJECTIONS AND CHALLENGED BALLOTS. THIS WILL BE COMBINED WITH THE UNFAIR LABOR PRACTICE CHARGES. HOWEVER, WE STILL HAVE NO HEARING DATE. AFTER THE ELECTION, THE OBJECTIONS AND CHALLENGES JUST SAT WITH THE BOARD WHILE THE COMPANY CONTINUED ITS ANTI-UNION CAMPAIGN OF WAGE FREEZES AND FIRINGS. WE NEVER GOT ANY INFORMATION FROM THE BOARD ABOUT WHY THE CASE WASN'T GETTING RESOLVED.

MEANWHILE, MANY OF THE JOBS ASTRON WAS RUNNING BACK WHEN THE PETITION WAS FILED ARE ALREADY DONE. THE EMPLOYEES WORKING ON THOSE JOBS HAVE BEEN LET GO. BEFORE THE UNION CAMPAIGN, PEOPLE WOULD GET TRANSFERRED TO ANOTHER JOB WHEN ONE WAS FINISHED. WITH THE UNION CAMPAIGN, THIS CHANGED. NOW THE COMPANY LAYS OFF UNION SYMPATHIZERS AT THE SAME TIME IT ADVERTISES IN THE NEWSPAPER FOR OTHER EMPLOYEES. IT DOESN'T SEEM TO MATTER THAT THE UNION FILES CHARGES. ALSO, TRUE TO ITS THREATS, ASTRON IS CLOSING OUT ITS SHEET METAL OPERATION. WHEREAS IT HAD OVER 100 SHEET METAL WORKERS WHEN WE HAD THE ELECTION LAST YEAR. THEY'RE NOW DOWN TO ABOUT A DOZEN.

THE MEN WHO WORKED AT ASTRON AND SHOWED SUPPORT FOR THE UNION FEEL LIKE THEY HAVE BEEN KICKED IN THE TEETH. WE WERE TOLD ABOUT THE PROTECTIONS OF THE NLRA. WE COULD SEE THE UNION FILING UNFAIR LABOR PRACTICE CHARGES ON OUR BEHALF--BUT IT DIDN'T GET US ANYTHING. THE SO-CALLED PROTECTIONS SEEM NON-EXISTANT.

NOT ONLY WERE WE FIRED FOR OUR UNION ACTIVITY, BUT WHEN WE NOW GO IN SEARCH OF OTHER WORK, WE FIND WE'RE BLACKLISTED. YOU MENTION THAT YOUR LAST JOB WAS ASTRON, AND NO ONE WANTS TO HIRE YOU. MY NAME IS KNOWN AND MY NAME IS MUD.

I'VE GOT YEARS OF EXPERIENCE IN SHEET METAL, BUT EVEN MORE IMPORTANT THAN MY EXPERIENCE IS MY TRAINING. AMONG THE ASTRON EMPLOYEES, I STOOD OUT. THE OTHERS ASKED ABOUT HOW I LEARNED TO DO SO MANY THINGS. MOST OF THEM COULD JUST HANG DUCT, WHEREAS I CAN READ BLUEPRINTS, FABRICATE, LAY-OUT, INSTALL, AND WELD. I TOLD THE OTHER MEN THAT I LEARNED MY TRADE BOTH THROUGH THE APPRENTICESHIP PROGRAM AND THE ADVANCED JOURNEYMAN TRAINING. WHEN THE OTHER SHEET METAL WORKERS COULD SEE HOW MUCH MORE I COULD DO THAN THEY COULD DO, THEY WANTED THIS TOO.

THE MEN ON THE JOB DEFINITELY BACKED-OFF AFTER THE COMPANY DID ALL THAT THEY DID. THEIR INTERROGATION AND INTIMIDATION WORKED AFTER A WHILE. THE MEN WERE WILLING TO TAKE SOME RISKS BY SIGNING CARDS AND SHOWING SUPPORT FOR THE UNION. BUT AFTER A WHILE, WHEN WE DIDN'T GET THE ELECTION AND THEN WE DIDN'T GET THE ELECTION RESULTS, THE MEN LOST THEIR COMMITMENT. THEY FELT ABANDONNED AND, TO LOOK OUT FOR THEIR LONG TERM JOB PROSPECTS, FELT THEY HAD TO COMPROMISE. THEY FELT COMPELLED TO FORGET ABOUT THEIR DREAMS TO LEARN A TRADE. INSTEAD, THEY HAVE DECIDED TO SETTLE FOR SIMPLY HANGING DUCT FOR AS LONG AS THEIR STRONG BACKS REMAIN STRONG.

THANK YOU FOR YOUR ATTENTION. I WILL BE HAPPY TO ANSWER ANY OF YOUR QUESTIONS.

Senator KENNEDY. I want to thank all of you. These are all very moving and compelling stories that we have heard here this morning. I would like to inquire of you for some elaboration.

Let me ask Mr. Reeves, two years ago you won the election by a vote of 201 to 131, yet the union still has not been recognized; is that correct?

Mr. REEVES. Yes.

Senator KENNEDY. As I understand from your testimony, much of the delay has been caused by the normal functioning of the system in processing the company's objections; is that correct?

Mr. REEVES. Yes, it is.

Senator KENNEDY. So what do you think would happen today if they had an election at All-American Gourmet?

Mr. REEVES. Most of the workers who are still there are angry and frustrated about how long it takes for a decision to come down. Basically, they are just disgusted about the system. And a lot of them quit; or just became frustrated, and it did not seem like they were getting any justice, so a lot of them have quit.

Senator KENNEDY. So if you had the elections today, do you think that the result, which was 2 to 1 in favor of it a few years ago, what do you think the outcome would be today? Do you think the union would win?

Mr. REEVES. No, no way.

Senator KENNEDY. For the reasons you have outlined here, because the workers have been frustrated and feel that their rights have not been protected?

Mr. REEVES. Yes, basically because of the way the system is being administered.

Senator KENNEDY. "Abused" might be a fairer word.

Mr. REEVES. Right, and misused, and the way that it is administered, there is no way that a union campaign would be successful at the All-American Gourmet plant. There is no way.

Senator KENNEDY. So what you are basically saying is that what the company lost in a free and open election, they are winning by jiggling the system and abusing the system, delaying the rights of the workers, as was reflected in the legitimate outcome of the election.

Mr. REEVES. Yes.

Senator KENNEDY. Let me ask Ms. Majors, what is the general feeling about the election process among the nurses and professionals at Fountain Valley, who previously indicated their support for a union?

Ms. MAJORS. I think that the workers are fairly frustrated. They cannot understand, and I cannot either, why this has dragged on as long as it has. We had our election last May. We had the challenge ballots. And we keep being told we are going to hear, we are going to hear, we are going to hear, it is coming, it is coming. And the workers are asking what is taking so long, don't they have to perform in a certain amount of time, and tell us what the answers are.

Our working conditions are steadily getting worse. A lot of the workers are leaving because they cannot handle staying in a system where they cannot see an end. There is just no end there.

Senator KENNEDY. If they had the election today, what do you think the outcome would be?

Ms. MAJORS. I think if we had the election today, we would win again, but I have to say that in the context of if they had had it six months ago—six months ago, we were still in a period where the managers and our head nurses were all trying to be very friendly with us. They were giving us enough staff to take care of our patients safely. As the time has gone on, that attitude from the hospital administration has definitely changed. Our staffing decreases; our workers are being harassed again.

One of our nurses was suspended just a few days ago over what would not even be a minor infraction six months ago. The main reason she was suspended was because she wrote a letter to our director asking to please correct the poor staffing; please give us enough nurses to care for our patients.

Senator KENNEDY. Does this reflect on the quality of care for the patients?

Ms. MAJORS. Yes, it does.

Senator KENNEDY. They are the ones who are the real losers.

Ms. MAJORS. The patients are the losers in this situation. As our numbers dwindle, you cannot give safe patient care when you do not have enough employees to do it and when you have an administration that will not give you the workers and in fact, harass those who are there to the point that they feel they have to leave, they cannot take it anymore.

Senator KENNEDY. Is the hospital still engaging in anti-union activities?

Ms. MAJORS. I would say yes. I know from my own point of view, I continue to face harassment from my employer, just in my own personal case, in the form of my supervisors being asked to discipline me for things that I have not done. We no longer have the captive audience meetings, but the tone is one of harsh discipline for any little thing, particularly if you are a known union supporter or if you are standing up for safe patient care in a situation.

The employees, though, have been reacting in a way that I would say at this point is getting more positive towards the union—yes, we do have to join together, because as individuals, we are lost.

That is pretty much where it stands right now.

Senator KENNEDY. Let me ask you, Mr. Beckwith, how you think this whole experience has affected the workers at Astron who were involved in organizing. Has this discouraged them?

Mr. BECKWITH. It is very discouraging when you have no jobs, no job projects, and you have been blacklisted.

Senator KENNEDY. Do you think some of them have lost their jobs because of the union activity?

Mr. BECKWITH. Yes, sir. Out of 120, they have approximately 12 left.

Senator KENNEDY. But are they still doing the kind of work where they would need the sheet metal workers?

Mr. BECKWITH. They have subcontracted their work. They were true to their word. They have taken the work away from their own people because they wanted a union, because they wanted to organize. They subcontracted their work out to get it away from them, to put them out of work, and to say, "What is the union doing for you now?"

Mr. **Kennedy**. So basically, I think what all of you are saying is if, after there is a vote and the employees demonstrate that they want a union, that the system permits such delay and procrastination that they can basically frustrate what has been the legitimate expression of the workers in these situations. I think all of you are saying that; is that right?

Mr. **Beckwith**. Yes, sir.

Ms. **Majors**. That is true.

Mr. **Reeves**. Yes.

Senator **Kennedy**. So clearly, it is the process, the procedures which have been set up and in place now that are being used in a way to really undermine the legitimate interests of workers. They were never set up to do that. They were set up to try and deal with certain contingencies which may or may not come up in a situation, but all of the witnesses of this panel, are expressing that those who have lost the union are using various techniques and tactics to frustrate the common will of the workers, and that is completely contrary to both the letter and the spirit of the Act.

I want to thank all of you. I want to give you the assurance that this Committee is going to be watching closely your own personal situations, to try and do whatever we possibly can to be sure there are not going to be recriminations against you.

What I will also do is—obviously, we would like to do it for all the various instances in the country to try and get after the National Labor Relations Board—but I will give you the assurance that I will be in touch with the National Labor Relations Board about each of the situations which have been identified here and will raise these questions with them and see if we cannot get more expeditious action.

Whether it will be successful or not, we will press it and pursue it and see what we can do to help. No magic wands. We cannot tell you that we have got a magic solution, but we will try and help and see what we can do.

I want to thank you very, very much for being here.

Ms. **Majors**. Thank you.

Mr. **Reeves**. Thank you.

Mr. **Beckwith**. Thank you.

Senator **Kennedy**. Our next panel includes three people who will recount first-hand the frustration of delays in having the first contract negotiated after an election has been won.

We welcome Mr. Frank Sullivan, accompanied by Eileen Hanson; Mr. Humberto Salinas; and Ms. Jolene Kitzky. As with the first panel, we will hear each of you give your testimony, and then I will have some questions for you.

We will start with you, Mr. Sullivan.

STATEMENTS OF FRANK SULLIVAN, ACCOMPANIED BY EILEEN HANSON, CHARLOTTE, NC; HUMBERTO SALINAS, CHICAGO, IL; AND JOLENE KITZKY, EARLVILLE, IL

Mr. **Sullivan**. Good morning. This is Eileen Hanson, the Business Agent for UFCW 204.

I am Frank Sullivan. I live in Charlotte, North Carolina, and I work for Harris-Teeter supermarket at its warehouse in Charlotte.

I appear before this Committee today with a considerable amount of apprehension, since I have been the victim on two different occasions of Harris-Teeter's unfair labor practice, which caused me to be out of work in excess of three years.

Even in the face of that apprehension, though, I appear before this Committee because of my concern for the fellow employees at Harris-Teeter and employees throughout the country who may be faced with similar illegal activities by their employer.

A little background about me may be helpful to this Committee. I currently work in the Harris-Teeter warehouse as a frozen food receiver, and I have held other positions in the warehouse during the last 18½ years. I am married. I have a daughter who is 11 and a son who is 6 years old, and I am 37 years old.

In late 1974, a number of the employees began to attempt to form a union at Harris-Teeter. The union was the Amalgamated Meat Cutters and Butcher Workmen of North America, predecessor of the United Food and Commercial Workers International Union.

Money was not the major factor, even though we were only making about $3.65 per hour at the time. Our major concern was job protection since without a union contract there was really no recourse for job termination.

In response to the organizing campaign, the president of the company told the employees that the company would do everything it could to keep the union out. Then the company began to fire people. They fired James Wright, Jimmie Martin and Jerome Little, all of whom worked for the company for many years and all of whom were leaders in the organizing campaign.

And when Earl Nixon testified on their behalf at the hearing before the National Labor Relations Board, he was fired, too.

It took six years before the company was finally ordered to take these employees back to work. During this time, fear of the employer was widespread, but many of us cautiously worked behind the scenes to convince the others that we had nothing if we did not elect a union to protect us against such firings. After a lot of hard work, in 1976, the people stood up against the company and a majority voted for the union.

Eleven and one-half years later, we still have not obtained a contract. In the fall of 1976, we began to bargain with the company for a contract covering the employees. After the bargaining started, Harris-Teeter fired Bill Huntley, a fellow employee and one of our negotiators, because of his activities on behalf of the union. By the way, this firing too place at the negotiation table.

At that point, the people had had enough, and in November of 1976, the majority of the employees struck the company to protest the illegal firings. I was among those who went out on strike.

In February of 1977, we offered to return to work, but the company refused to reinstate us for a number of months. Eventually, the Labor Board found that the company had violated the law by refusing to allow us to return to work, and in 1981, after my case and those of other strikers had gone all the way to the Court of Appeals, where we won, we received back pay for the time we were out of work.

While this case was working its way through the courts, we attempted to resume bargaining with Harris-Teeter. In 1980, I was added to the bargaining committee. The company proposed less than we already had in vacation, sick leave, and leaves of absence with no economic increases. They refused to agree to arbitration of any disputes, including discharges, and wanted the right to fire employees rather than lay them off if there was a business downturn. That way, the employee would never have a right to come back to work for the company if there was a business upturn.

Our prime concern continues to be job security, and since the company was offering nothing in that area, reaching a contract was impossible.

In 1983, the company began circulating a rumor that it would move its warehouse from Charlotte to Greensboro, North Carolina if the union was not removed from the plant. The company also solicited employees to sign cards denouncing the union.

In January of 1984, I was discharged supposedly for accidentally hitting a doorway and causing a slight amount of damage while driving a forklift. Others, who were not union supporters, had done similar or greater damage, and nothing had happened to them. In an attempt to show that it was not discriminating against me, however, the company thereafter fired Bill Neeley, a white who was not an open union supporter, for doing $3 worth of damage.

When I went to apply for unemployment compensation, Harris-Teeter tried to block my application. Every time I interviewed for a job with another employer and a reference to Harris-Teeter came up, the prospective employer no longer wanted anything to do with me. I was forced to take temporary jobs at a substantially reduced income compared to what I would have made at Harris-Teeter. My family and I suffered enormously. By this time, we had two children. My wife had to get a second job. I was used to being the major breadwinner of the family, and I had to lower myself in the eyes of my children.

My daughter would ask me why I was not working. When I tried to explain, she just could not understand why I could be treated so unfairly.

My friends were often coming around calling me "Mr. Mom". This had a devastating effect on me, because I was raised with the idea that, as a man, I was responsible for providing support for my family.

Sometimes I wonder how I and my family got through it. Not only had the company taken away my job and my income; they were trying to take away my manhood. It hurt me to see my family not get what they needed and to see my wife exhausted after working two jobs. I felt useless.

In the latter part of 1984, our gas was cut off because we could not meet our bills. I got a bad credit rating, which I will carry with me for years to come. My small savings account was completely wiped out.

The Labor Board charged the company with violating the law by bargaining in bad faith, by threatening to shut down the plant, by discharging Bill Neeley and me, and by committing various other acts of intimidation.

In 1986, the company finally settled these charges by promising not to act unlawfully again and by agreeing to take Neeley and I back to work and to give us back pay. By this time, two and a half years had passed since we had been discharged. Although it was nice to receive the back pay, the money was totally inadequate to reimburse me and my family for all that we had been through. The scars that developed will be with us for a lifetime, and I know that is at least equally true for Bill Neeley, whose wife was seriously ill when he was discharged and who lost his health insurance. Neeley's wife died while he was out of work.

Even after I returned to work and the company had promised once again to stop violating the law, our problems continued. The company discharged another employee for his union activities and continued to refuse to bargain fairly. Just a few months ago, the company settled more Labor Board complaints about it by again promising to obey the law and by taking back other discharged employees.

While I doubt that any member of this Committee has ever faced the horror of working for an anti-union employer who will stop at nothing to defeat the union, I want you to know that in the real world these things are happening. And I want you to know that there are 300 employees in Charlotte, North Carolina who worry every day that they may be the next person singled out to be made an example of to discourage the other employees from supporting the union.

It has been over 11 years since we voted the union in, and we still do not have a contract. In my opinion, something is terribly wrong with a system that allows these kinds of things to happen again and again.

Thank you.

Senator KENNEDY. Thank you, Mr. Sullivan.

[The prepared statement of Mr. Sullivan follows:]

TESTIMONY OF FRANK SULLIVAN
BEFORE THE HUMAN RESOURCES COMMITTEE
UNITED STATES SENATE

I am Frank Sullivan. I live in Charlotte, North Carolina and have worked in the Harris-Teeter warehouse in Charlotte in excess of 18 1/2 years.

I appear before this Committee today with a considerable amount of apprehension since I have been the victim on two different occasions of Harris-Teeter's unfair labor practices which caused me to be off work for in excess of three years. Even in the face of that apprehension, though, I appear before this Committee because of my concern for my fellow employees at Harris-Teeter and employees throughout the country who may be faced with similar illegal activity by their employers. I do so also with the hope that some day the Congress of the United States will see its way clear to change our labor laws to more effectively remedy unfair labor practices and to eliminate delays in the process of bringing employers to justice. The weak remedies and the delays all seem to work in the employer's favor. While the law says that I have the right to organize and to bargain collectively through a union, those rights don't really mean a great deal when an employee or group of employees are put through what we have gone through at Harris-Teeter.

A little background about me may be helpful to this Committee. I currently work in the Harris-Teeter warehouse as a frozen food receiver and have held several other positions in the warehouse during the last 18 1/2 years. I am married and I have a daughter who is 11 years old and a son who is 6 years old. I am 37 years old.

The union organizing campaign began in late 1974. I was first approached about signing a union authorization card in September or October of 1975. When I considered the merits of supporting the union, the major concern that I had was job protection since, without a union contract, there was really no recourse for job terminations. Money was not the issue, even though we were only making about $3.65 per hour at the time, since I felt that even if I was making $50 an hour it would make no difference if I had no job security.

In response to the organizing campaign, the president of the company told employees that the company would do everything it could to keep the union out. Then the company began to fire people. They fired James Wright, Jimmie Martin and Jerome Little, all of whom had worked for the company for many years and all of whom were leaders in the organizing campaign. If the company's intention in firing these three men was to scare us--it worked! We all feared that if the company were to find out that we were supporters of the union, we would be fired. We would talk among ourselves to try to get the courage to continue to support the union even though fear was extensive.

The union filed charges with the National Labor Relations Board because of the firings. When the NLRB hearing was held, one of our fellow employees, Earl Nixon, testified on behalf of the three men who had been fired. Shortly after the hearing, Earl Nixon was fired too. If we didn't understand the message the first time, we certainly understood it this time. Fear of the employer was wide spread, but many of us cautiously worked behind the scenes to convince the others that we had nothing if we did not elect a union to protect us against such firings. After a lot of hard work, in 1976 the people stood up against the company and a majority voted for the union.

In the fall of 1976, we began to bargain with the company for a contract covering the employees. In the bargaining we had union representatives and a committee of rank and file employees to assist in bargaining a contract. One of the committee members was Bill Huntley, a fellow employee of ours. After the bargaining started, Harris-Teeter fired Bill Huntley because of his activities on behalf of the union.

At that point the people had had enough, and in November 1976 a majority of the employees struck the company to protest the illegal firings. I was among those who went out on strike. In February 1977 we offered to return to work, but the company refused to reinstate us. I didn't get back to work until June 1977 when the company finally agreed to call me back and others didn't get back until later. I was without a pay check for 7 1/2 months during this period. This was an extremely hard period on my family. I fell behind on my bills, my gas was cut off and the electric company was breathing down my neck. The family had to forego necessities. My daughter, who was born in 1976 and had had major surgery just before we went out on strike, became ill again and was hospitalized in early 1977 with a viral infection. In addition, during the time I was out of work my father died. In the course of 7 1/2 months, my life savings were wiped out. As strikers, we received $25 or $30 per week in strike benefits, but I and others passed it on to others in more need and I tried to live off my savings.

In 1981, after my case and those of the other strikers had gone all the way to the Court of Appeals where we won, I received about $3,000 in back pay and interest for the time that I was out of work in 1977. While it was nice to receive the money, it did not come near to reimbursing me and my family for all of our expenses and the grief that we had been put through with me being out of work for 7 1/2 months and, obviously, payment by the company of back pay to 122 strikers did not stop the company from further serious unfair labor practices.

By 1980, I was on the bargaining committee and the union continued to try to negotiate a contract with Harris-Teeter. Negotiating with Harris-Teeter was a real experience. It appeared to me that the company had no intention of trying to reach an agreement with the union. They proposed less than we already had in vacations, sick leaves and leaves of absence with no economic increases. They refused to agree to arbitration of any disputes, including discharges, and wanted the right to fire employees rather than lay them off if there was a business downturn. That way, the employee would never have a right to come back to work for the company if there was a business upturn. Our prime concern continued to be job security and, since the company was offering nothing in that area, reaching a contract was impossible. It appeared to me that the company in bargaining recognized the fact that NLRB remedies for refusing to bargain in good faith are really meaningless. As we have seen in this case, several years after the company refused to bargain in good faith it was told to bargain in good faith in the future and required to post a notice on the bulletin board. That type of remedy is not likely to compel an anti-union employer to bargain in good faith.

In 1983 the company began circulating a rumor that it would move its warehouse from Charlotte to Greensboro, North Carolina if the union was not removed from the plant. An attempt was then initiated to decertify the union, but, fortunately, it failed.

In January 1984, I was driving a fork lift through a very narrow door in the warehouse and accidentally hit the doorway causing a slight amount of damage. Others, who were not union supporters, had done similar or greater damage and nothing had happened to them, but I was fired because I was a union supporter. To show that they were not discriminating against me, the company thereafter fired Bill Neeley for doing $3 worth of damage since he was white and not an open union supporter.

I was not reinstated to my job until July 1986, 2 1/2 years after I was fired. The company fought my unemployment and I tried to find permanent work. Every time I interviewed for a job and a reference to Harris-Teeter came up, the companies no longer wanted anything to do with me. Even so, I took several temporary jobs beginning in September 1984, but at a substantially reduced income compared to what I would have made at Harris-Teeter. This 2 1/2 years where I was out of a permanent job imposed a severe hardship on my family. By now we had two children. My wife had to get a second job. I was used to being the major breadwinner of the family and I had to lower myself in the eyes of my children. My daughter would ask me why I was not working. When I tried to explain it, she couldn't understand why I could be treated so unfairly. People were calling me, "Mr. Mom." This had a devastating effect on me mentally because I was raised with the idea that, as a man, I was responsible for providing support for my family. Sometimes I wonder how I and my family got through it. Not only had the company taken away my job and my income, they were now trying to take away my manhood. It hurt me to see my family not get what they needed and to see my wife exhausted. I felt useless. In the latter part of 1984, our gas was cut off because we couldn't meet our bills. I got a bad credit rating which I will carry with me for years to come because I couldn't pay my bills. My small savings account was wiped out.

In June 1986, the NLRB case concerning the firing of Bill Neeley and I went before an administrative law judge of the National Labor Relations Board. After three days of hearing, the company agreed to settle the case and to reinstate me with my lost wages, less my interim earnings, plus interest. This settlement, while it was nice to receive, was totally inadequate in reimbursing me and my family for all that we had been through. The scars that developed during that 2 1/2 years will be with us for a lifetime. We had no choice but to settle the case since back pay was all we would obtain if we had fought the case all the way through the Board and courts. That is all the remedy that the law provides. You have to wonder about a system in which it takes the party who was wronged 2 1/2 years to even get before the first level hearing and then provides a remedy which is not strong enough to discourage further illegal action and does not even reimburse the employee for his losses.

While I doubt that any members of this Committee have faced the horrors of working for an anti-union employer who will stop at nothing to defeat the union, I want you to know that in the real world these things are happening and I want you to know that there are 300 employees in Charlotte, North Carolina who worry every day that they may be the next person singled out to be made an example of to discourage the other employees from supporting the union. It has been over 11 years since we voted the union in and we still do not have a contract. I am asking you for the sake of my fellow employees and for other employees like us to put some teeth into the labor laws in this country so that we can exercise our rights to organize and to bargain collectively. The workers need your help.

Senator **Kennedy**. Mr. Salinas?

Mr. **Salinas**. My name is Humberto Salinas. I was born in Nuevo Leon, Mexico, and I am a business agent with the International Ladies' Garment Workers' Union, in Chicago, Illinois, since 1984.

I want to tell you about Del Rey Tortilleria, which is located in the Mexican community on Chicago's South Side. Del Rey operates two plants there, with 90 workers.

In 1982, the workers won a union election, after years of delay. We still do not have a contract. Why can't we join a union and form our own organization to protect ourselves?

In 1982, I was the Executive Director at Casa Aztlan, a community social service organization in that neighborhood. Throughout the community, Del Rey was well-known for abusing its workers. When I saw the workers enthusiasm and hope, I volunteered my time to help.

The conditions at Del Rey were terrible—long hours with no breaks, minimum wages, no health insurance, no holidays or vacations. The workers then decided to form a union.

The company immediately responded to the organizing effort with an illegal campaign of threats, firings and bribes. Del Rey acted like it was above the law and could totally, totally ignore it. It still acts that way.

The Labor Board found 15 separate unfair labor practices. The company unfair labor practices were effective. About 60 workers signed authorization cards before the election, but the union won the election held on December 22, 1982 by a 38-23 margin, receiving fewer votes than workers who had signed cards.

Del Rey objected to the election results. But the Administrative Law Judge stated that the company's objections were "wholly without merit". The Judge certified the election results and upheld the unfair labor practice charges against Del Rey in August 1983.

Del Rey filed exceptions to the Judge's decision, but the National Labor Relations Board affirmed the Administrative Law Judge. The Labor Board's decision in November 1984 came almost two years after the election.

The union approached the company to begin negotiations shortly after the decision. It also requested information necessary for bargaining. The company refused to furnish the information or to bargain.

In August 1984, the Board found that Del Rey had refused to bargain in good faith as required by the National Labor Relations Act. The Board recognized that Del Rey was delaying without good reason.

Del Rey still refused to bargain after the National Labor Relations Board decision. The Board had to seek enforcement of its own order from the 7th Circuit Court of Appeals, which enforced the Board's order in July 1987.

During these four and one-half years of legal delay, the workers tried to keep their organization together. In the beginning, everybody was together, everybody was united. In the months following the election, about 80 percent of the workers regularly attended our union meetings. In 1983, workers were strong enough to have a successful walk-out over shift assignments. But Del Rey's delaying tactics were effective again. The plant has a great deal of turnover. Many of the workers most active in the organizing drive got discouraged and left Del Rey.

Del Rey continued to use its power to harass and fire union supporters illegally during the endless years of legal delays. In 1985, the union signed up new members and began holding meetings again. The company again fired workers for union activities.

It is now over five years since the workers voted for union representation. A single bargaining session took place in November 1987. The company has not even agreed to a date for a second bargaining session. The union must bargain from a much weaker position than it had in 1982. The key in-plant activists have gone, and many employees are discouraged.

Meanwhile, the conditions for the Del Rey workers remain basically the same as in 1982. They still do not have health insurance or benefits, vacations, holidays, or regularly-scheduled break periods or regularly-scheduled days off. They do not have protection against management abuse, harassment and favoritism. For over five years, Del Rey has successfully defied the law and resisted the workers' demand for justice.

Thank you.

Senator KENNEDY. Thank you, Mr. Salinas.

[The prepared statement of Mr. Salinas follows:]

TESTIMONY OF HUMBERTO SALINAS, BEFORE THE SUB-COMMITTEE ON LABOR OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

FEBRUARY 5, 1988

My name is Humberto Salinas. I am from Nuevo Leon, Mexico, and am 29 years old. I am a business agent for the International Ladies' Garment Workers' Union, in Chicago, Illinois, and have been on staff since 1984.

I want to tell you about Del Rey Tortilleria. Del Rey is located in Pilsen, a predominately Mexican-American neighborhood on Chicago's South Side. It employs about 90 workers in two plants making tortillas. The workers voted for union representation in 1982. Del Rey began years of litigation after the election. The company's claims had no merit, as the NLRB and courts found time and again. But Del Rey successfully delayed bargaining, while it used its power to fire, threaten and bribe union activists. It took five years after the election to force Del Rey to even sit down at the bargaining table, and the workers still do not have a contract.

In 1982, Del Rey was a profitable operation. It still is. In fact, Del Rey is planning to expand to a new, larger manufacturing plant. But Del Rey was and is a terrible place to work. In 1982, everyone was paid the minimum wage of $3.35 an hour. (Now they earn $3.95 an hour). Many employees worked 12 hour days. The company provided no health insurance, no vacations and no holidays. In fact, Del Rey forced employees to work on Christmas Day and New Year's Day. There were no rest breaks during the work day, except a half-hour for lunch. The plant was and still is very hot from the ovens, with almost no ventilation, since the windows are kept closed. The supervisors routinely cursed the workers and treated them with no respect, like the employees were machines or bags of flour. The bosses were little dictators enjoying their power over the workers. Nothing important has changed in the conditions at Del Rey since then.

In September, 1982, several workers asked for a regularly scheduled rest break. Mrs. de la Torre, the plant manager, called them "a bunch of pigs" and sent them home early as punishment. The workers then called the ILGWU, and the organizing effort began.

My involvement with Del Rey began around this time. I did not work for the union then, but was the director of Casa Aztlan, a social service agency in Pilsen. Along with many Pilsen community leaders and residents, I volunteered my time to help the workers. I arranged dances and social events and visited workers in their homes.

The company immediately responded to the organizing effort with an illegal campaign of threats, firings, and bribes. Del Rey acted like it was above the law and could totally ignore it. It still acts that way.

In three captive audience meetings of employees, the supervisors promised raises if the workers quit the union. Before the organizing drive, the company had almost never fired anyone. But, the company fired eight or nine employees during the organizing campaign. Several were told they could have their jobs back if they quit the union. The company threatened to call the Immigration and Naturalization Service to intimidate the many undocumented aliens employed at Del Rey. In fact, the INS did raid the factory for the first time in five years two weeks before the representation election, arresting 18 employees. Supervisors conducted many coercive interrogations. They told workers that they would never win any gains through collective bargaining. So far, Del Rey has made good on this illegal promise.

The NLRB found 15 separate acts that constituted unfair labor practices. These acts were effective. About 60 workers signed authorizations cards before the election. But the union won the election held on December 22, 1982 by a 38-23 margin, receiving fewer votes than workers who had signed cards.

Del Rey objected to the election results. The company claimed that the union had injected racial animus into the campaign by publicly charging the company with using the Immigration Service as a tool to fight the union. The Administrative Law Judge stated that the union was merely expressing an opinion on a public event, and that the company's charge was "wholly without merit." Del Rey also claimed that the union campaigned too near the polls, but the ALJ found that the union's campaigning was perfectly legal. The ALJ certified the election results (and upheld the unfair labor practice charges against Del Rey) in August of 1983.

Del Rey filed exceptions to the ALJ's decision concerning the claim of illegal union campaigning. The National Labor Relations Board affirmed the ALJ, with minor modifications. The NLRB's decision in November, 1984, came almost two years after the election.

The union approached the company to begin negotiations shortly after the decision. It also requested information necessary for bargaining. The company refused to furnish the information or to bargain. It again raised the charge of illegal campaigning by the union. The union was forced to go through the NLRB procedures yet again. A complaint issued, and in August, 1985, the Board found that Del Rey had refused to bargain in good faith as required by the National Labor Relations Act. The Board recognized that Del Rey was delaying without good reason. It stated that the company's issues "were or could have been litigated in the prior representation proceeding." But Del Rey wanted delay and more delay.

Del Rey still refused to bargain after the NLRB decision. The NLRB had to seek enforcement of its order from the 7th Circuit Court of Appeals. In granting enforcement, the 7th Circuit also pointed out that the company had no new evidence or good reason to relitigate the illegal campaigning claim. The 7th Circuit decision came down in July, 1987.

During these four and one-half years of litigation, the workers tried to keep their organization together. In the beginning, everyone was together and united. In the months following the election, about 80 percent of the workers regularly attended union meetings. In 1983, workers were strong enough to have a walk-out and to force Del Rey to return workers to their shifts who had been transferred to other shifts involuntarily.

But Del Rey's delaying tactics were effective. The plant has a great deal of turnover. Many of the workers most active in the organizing drive left Del Rey. For example, the in-plant organizing committee of 1982 had six members. By 1985, five of these six had stopped working at Del Rey. The company promoted some activists to buy their loyalty. Del Rey continued to use its power to harass and fire union supporters illegally during the endless years of litigation. In 1985, the union signed up new members and began holding meetings again. Instead of 100 workers attending, only about 15 came. One reason for this: the company again fired workers for union activity. In November, 1985 the company agreed to backpay and reinstatement for four workers fired in April, 1985. It took two years after the agreement before the company actually reinstated any of the discharged workers. Del Rey's truck drivers, who are not part of the ILGWU bargaining unit, also tried to organize a union in 1985. All eight drivers were fired.

It is now over five years since the workers voted for union representation. A single bargaining session occurred in November, 1987. The company made no proposals of its own and did not accept or reject any of the union's proposals. The company has not even agreed to a date for a second bargaining session. The union must negotiate from a much weaker position than it had in 1982. The key in-plant activists have left, and many employees are discouraged about the union's effectiveness.

Meanwhile, the conditions for the Del Rey workers remain basically the same as in 1982. They now earn $3.95 an hour. They still do not have health insurance or benefits, vacations, holidays or regularly scheduled break periods or regularly scheduled days off. They do not have protection against management abuse, harassment and favoritism. For over five years, Del Rey has successfully defied the law and resisted the workers' demand for justice.

Senator **Kennedy**. Let me mention, Mr. Sullivan, how much I admire your extraordinary personal courage in coming here to testify after all you have been through. Your testimony indicates that you and your fellow workers have been through years of company violations of the law.

What do you see as the biggest problem facing the employees under the NLRA?

Mr. **Sullivan**. Well, the biggest problem that I see is the remedies. I mean, a company can break the law. This is about the only law that I have seen that can be broken time and time again—I might be wrong, but this is the only law that I see that Americans have that can be broken again and again. And the only thing the company can do is just pay a little money here, and do it again. There are no stiff penalties for a company with unfair labor practices.

All the suffering I went through, all the pain I went through at the time I was out of work, it is a wonder I never did go crazy. Just imagine yourself, sitting there, wanting to work, cannot work, trying to get a job, and everywhere you go, people say, "You are just the material we are looking for." Then they get a reference from Harris-Teeter, and the next thing you know, they do not want anything to do with you. Then they want to know, "Well, you stayed with this company this long; why did they all of a sudden fire you?" And then you have to go into detail and tell them this and that, and then they find out that you filed charges with the Labor Board, and they don't want anything to do with you.

And when you sit there at home, wanting to work, and your wife has to go out and get a second job, she is exhausted when she gets off her first job, and there you are, sitting there, wanting to work, and your kids wanting and needing things. We could not even afford to go to the doctor because we did not have any money to go to the doctor.

I mean, it was really like a nightmare. It is something that I don't ever want anybody to go through. At the time we were out on strike, it is a wonder I did not lose my wife and my family. Some of the fellows did lose their wives because their wives just couldn't take the pressure; they separated. And like Bill Neeley, here is a man who did $3 worth of damage—$3—and this company fired him. His wife was already ill in the hospital, and all of a sudden, they just threw him out the door, and he lost his wife. Now, that is something he is going to carry to his grave, the fact that he could not provide for his wife the way he needed to because he did not have a job, because this company did not want us to have a union.

It is just like a nightmare. And like I said, something is wrong with the system when these sort of tactics happen again and again and again, and all they do is pay a few thousand dollars here and go right back and do the same thing. There need to be some corrections done, badly.

Senator **Kennedy**. Ms. Kitzky, please proceed.

Ms. **Kitzky**. My name is Jolene Kitzky. My mailing address is Route 2, Box 216, Earlville, Illinois. I am a former employee of Impact Industries at its Castings plant in Sandwich, Illinois.

Twelve other employees and I first met with the UAW organizer on February 17, 1980. Within a month, 106 of Impact's 118 employees had signed UAW authorization cards. On March 17, UAW filed the petition for a representation election.

Within a week, all hell literally broke loose in the plant. You name it, Impact did it—threats, discharges, promises, surveillance and interrogation. If there is an unfair labor practice somewhere that Impact did not commit, it was apparently an oversight and not for lack of effort.

Let me quote from the NLRB decision.

> When the organizing campaign surfaced, the Respondent immediately embarked on an anti-union campaign designed to discourage its employees from supporting the Union and engaged in numerous violations of the Act in its effort. These include interrogations; threats of plant closure, discharge and loss of benefits; solicitation of grievances; promises of wage increases and other benefits; grants of improved vacation, break periods and lunch benefits and of an employee incentive program; creation of the impression of surveillance of union activities; public reprimand of an employee because she engaged in protected concerted activity; and discharge of 13 employees out of a unit of 118."

The NLRB conducted the representation election on May 16, 1980. The results were 49 votes for the UAW, 59 against, and 24 challenged ballots. Impact's campaign of massive unfair labor practices obviously had achieved the desired result. The UAW filed objections and unfair labor practices.

The hearings before the Administrative Law Judge were held in February 1981, nine months after the election. The Judge's decision was issued in March 1982, almost two years after the election.

The Administrative Law Judge determined that the unfair labor practices committed by Impact were so serious that a bargaining order was required. Impact, knowing that delay would work to its advantage, appealed the ALJ's decision. Over five years later, on July 30th, 1987, the NLRB upheld the ALJ's decision.

Although the UAW repeatedly made inquiries, the NLRB never told us why it took so long to decide our case.

Mr. Chairman, I would ask that copies of our letters to the Board and the NLRB's responses be included in the record.

Senator KENNEDY. They will be so included.

Ms. KITZKY. On August 28, 1987, Impact filed a Petition for Review of the NLRB decision with the Seventh Circuit Court of Appeals. Shortly thereafter, Impact filed a Motion to Reopen the Record with the NLRB, arguing that after almost eight years, only 13 percent of the 1980 work force remains at the plant, and they should not be forced to bargain with the UAW after such a long delay.

The NLRB denied Impact's Motion to Reopen the Record. In September 1987, Impact filed a Motion For Leave to Make New Evidence Part of the Record with the Seventh Circuit. The Motion asked the Court to consider the evidence of employee turnover in evaluating the Board's remedy. The Court granted that Motion.

Now, a crucial part of Impact's case before the Seventh Circuit is that even if it committed all the outrageous unfair labor practices found by the NLRB, it should not have to bargain with the UAW, since the NLRB took so long to decide that Impact had violated the rights of its workers.

Now we have to wait for the Court of Appeals Decision. Almost eight years have passed since the representation election, and now Impact is arguing that it should get off because the NLRB sat on this case so long. This is hard to believe. The Board's own delay in enforcing the law is being used by the company to get off complying with the bargaining order.

Whatever the outcome of the Court of Appeals decision, the workers have already suffered irreparable harm. Even if the Court of Appeals ultimately upholds the bargaining order, it cannot compensate the workers for the wages, benefits, and improved working conditions which they could have bargained for during the last eight years. And if the Court of Appeals accepts the company's argument that they should not be required to bargain with the UAW because of the long delay, then the workers will have to start all over again with a new election, and it will be years before they will be able to enjoy the fruits of collective bargaining. Either way, for over eight years, Impact will have achieved its objective in committing the illegal conduct during the 1980 representation election—that is, maintaining a non-union shop. Thus, Impact has effectively profited from its illegal conduct.

It seems to me that something is fundamentally wrong when companies like Impact are able to profit by violating the rights of workers and subverting the holding of fair and free representation elections. It is simply not fair when companies are able to use the delays involved in the procedures for enforcing the National Labor Relations Act as a basis for avoiding their statutory obligation to bargain collectively with worker representatives.

Thank you.

Senator KENNEDY. Thank you for that very moving testimony.

[The prepared statement of Ms. Kitzky, with attachments follow:]

TESTIMONY OF JOLENE KITSKY
before the
SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
February 5, 1988

My name is Jolene Kitsky. My mailing address is Route 2, Box 216, Earlville, Illinois. I am a former employee of Impact Industries at its Castings plant in Sandwich, Illinois. I am currently employed by the State of Illinois as a Correction Officer at the Sheridan Corrections Center.

Impact has manufactured aluminum and zinc castings at its foundry in Sandwich, Illinois since 1961. Sandwich is a small town about 90 miles Southwest of Chicago. Other than Impact, there is very little industry in the area.

I was the one that originally contacted the UAW, in February, 1980, to organize the plant. I started the organizing drive after talking to fellow workers about how bad working conditions were at Impact. Impact had no effective health and safety program. Raises and job assignments were based on favoritism. In my opinion, Impact is insensitive to its employees and treats workers like robots. Obviously, many other Impact employees felt as I did.

Twelve (12) other employees and I first met with the UAW organizer on February 17, 1980. Within two days, a majority of the employees had signed UAW Authorization Cards. Within a month, 106 of Impact's 118 employees had signed UAW authorization cards. On March 17, the UAW filed the petition for a representation election.

Within a week after the UAW obtained almost every employee's authorization card, all hell literally broke loose in the plant. You name it, Impact did it: threats, discharges, promises, surveillance and interrogations. If there's an unfair labor practice somewhere that Impact didn't commit, it was apparently an oversight and not for lack of effort. Let me quote from the NLRB decision:

> "When the organizing campaign surfaced, the Respondent immediately embarked on an antiunion campaign designed to discourage its employees from supporting the Union and engaged in numerous violations of the Act in its effort. These include interrogations; threats of plant closure, discharge, and loss of benefits; solicitation of grievances; promises of wage increases and other benefits; grants of improved vacation, break periods, and lunch benefits and of an employee incentive program; creation of the impression of surveillance of union activities; public reprimand of an employee because she engaged in protected concerted activity; and discharge of 13 employees out of a unit of 118 employees. The unlawful conduct did not cease with the Union's loss of the 16 May election. Some of the most serious violations, including the discharges, occurred while the Union's objections were pending.
>
> It is clear that the Respondent's unlawful conduct struck at the very heart of the employees' organizational efforts. The Respondent unlawfully discharged fully 11 percent of its bargaining unit. Several of the violations were committed by Respondent's president, Carl Becker. Clearly, an employer's unlawful conduct is heightened when it is committed by the highest-level management official. Certain of the violations were committed by Becker at meetings of large groups of employees and therefore widely disseminated among the entire workforce. Threats of the kind found herein have a profound impact on employees. Because it is not the Board's policy to require that unlawfully granted benefits, such as those given by the Respondent herein, be rescinded, they are particularly lasting in their effect on employees and difficult to remedy by traditional means.
>
> In light of the violations found herein, we conclude that the possibility of erasing the effects of the Respondent's unfair labor practices and of conducting a fair election by the use of traditional remedies is slight."

I was there during the organizing drive and representation election in 1980. While the NLRB decision shows all sorts unfair labor practices, in my opinion, the discharges of 13 UAW supporters and the repeated threats to close the plant if the UAW won were the most devastating. It's difficult to weigh casting a vote about the merits of unionization if you see your fellow workers fired and if the top executive of the company is saying the plant will close if the union comes in.

The NLRB conducted the representation election on May 16, 1980. The results were 49 votes for the UAW, 59 against and 24 challenged ballots. Impact's campaign of massive unfair labor practices obviously had achieved the desired result. The UAW filed objections and unfair labor practices.

The hearings before the Administrative Law Judge were held in February, 1981, nine months after the election. The Judge's decision issued in March, 1982, almost two years after the election. By that time, over half of the 130 employees on the Excelsior list were gone.

The Administrative Law Judge determined that the unfair labor practices committed by Impact were so serious that a bargaining order was required. Impact, knowing that delay would work to its advantage, appealed the ALJ's decision. Over five years later, on July 30, 1987, the NLRB upheld the ALJ's decision.

On August 28, 1987, Impact filed a Petition for Review of the NLRB decision with the Seventh Circuit Court of Appeals. Shortly thereafter, Impact filed a Motion to Reopen the Record with the NLRB, arguing that after almost eight years, only 13 percent of the 1980 workforce remains at the plant and that they should not be forced to bargain with the UAW after such a long delay.

The NLRB denied Impact's Motion to Reopen the Record. However, Impact continues to rely on its argument that the high percentage of employee turnover in eight years invalidates the finding that only a bargaining order can remedy the outrageous unfair labor practices committed by Impact. In September, 1987, Impact filed a Motion For Leave to Make New Evidence Part of the Record with the Seventh Circuit. That Motion asked the Court to consider the evidence of employee turnover in evaluating the Board's remedy. The Court granted that Motion. Now, a crucial part of Impact's case before the Seventh Circuit is that even if it committed all the outrageous unfair labor practices found by the NLRB, it should not have to bargain with the UAW, since the NLRB took so long to decide that Impact had violated the rights of its employees.

Now we have to wait for the Court of Appeals decision. Almost eight years have passed since the representation election, and Impact is arguing that it should get off because the NLRB sat on this case so long. This is hard to believe. The Board's own delay in enforcing the law is being used by the company to get off complying with the bargaining order.

Whatever the outcome of the Court of Appeals decision, the workers have already suffered irreparable harm. They had to endure the threats and intimidation by Impact which effectively denied them a fair and free election. Then, because Impact refused to bargain with the UAW while it was pursuing its appeals to the NLRB and the Court of Appeals, the workers were denied an opportunity to bargain for better wages, benefits and working conditions for over eight years. Given this state of affairs, it is hardly surprising that so many workers decided to leave the company during this period.

Even if the Court of Appeals ultimately upholds the bargaining order, it cannot compensate the workers for the wages, benefits, and improved working conditions which they could have bargained for during the last eight years. And if the Court of Appeals accepts the company's argument that they should not be required to bargain with the UAW because of the long delay, then the workers will have to start all over again with a new election, and it will be years before they are able to enjoy the fruits of collective bargaining. Either way, for over eight years Impact will have achieved its objective in committing the illegal conduct during the 1980 representation election — that is, maintaining a non-union shop. Thus, Impact has effectively profited from its illegal conduct.

It seems to me that something is fundamentally wrong when companies like Impact are able to profit by violating the rights of workers and subverting the holding of fair and free representation elections. It is simply not fair when companies are able to use the delays involved in the procedures for enforcing the National Labor Relations Act as a basis for avoiding their statutory obligation to bargain collectively with worker representatives.

Thank you.

opeiu494

Solidarity House
8000 EAST JEFFERSON AVE.
DETROIT, MICHIGAN 48214
PHONE (313) 926-5000

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW

OWEN F. BIEBER, PRESIDENT
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VICE-PRESIDENTS
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Telephone 379-7200
Area 312

JAMES L. WRIGHT, Director
REGION 4, UAW
5132 W. HARRISON
CHICAGO, ILLINOIS 60644

August 16, 1983

Office of Executive Secretary
National Labor Relations Board
1717 Pennsylvania Ave.
Washington, D. C. 20570

RE: 33 CA 4847,
ETAL

Dear Executive Secretary:

Would you kindly advise the status of the Board Review of of Employer's Appeal from the decision attached.

This matter has been pending with your office since April 19, 1982.

Sincerely,

Polly A. Connelly,
Co-Ordinator
National Organizing Department

PAC:pd
opeiu494

Encl.

cc: File Copy ✓

NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

202-254-9430

August 22, 1983

Re: Impact Industries, Inc.
Case 33-CA-4847, *et al*.

Ms. Polly A. Connelly, Co-Ordinator
National Organizing Department
Int'l. Union, United Automobile,
Aerospace & Agricultural Implement
Workers of America-UAW
Solidarity House
8000 East Jefferson Ave.
Detroit, Michigan 48214

Dear Ms. Connelly:

This will acknowledge your August 16, 1983, inquiry regarding the above case.

The Board regrets the delay in processing the above case. However, this matter has been before the Board for deliberation and is now nearing the end of the decisional process. Although I cannot provide you with an exact date, I anticipate that a decision will be forthcoming in the not too distant future.

Very truly yours,

Joseph E. Moore

Joseph E. Moore
Associate Executive Secretary

Called 11-10-83
Same response

Solidarity House
8000 EAST JEFFERSON AVE.
DETROIT, MICHIGAN 48214
PHONE (313) 926-5000

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW

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JAMES L. WRIGHT, Director
REGION 4, UAW
5132 W. HARRISON
CHICAGO, ILLINOIS 60644

January 25, 1984

Mr. Joseph E. Moore
Associate Executive Secretary
National Labor Relations Board
Washington, D.C. 20570

Re: Impact Industries, Inc.
Case 33-CA-4847 et al

Dear Mr. Moore:

The above captioned case has been before the Board for almost two years. We would like to know when the decisioned process of the Board will be concluded.

As per your August 22, 1983 letter to the UAW, you "anticipated that a decision was forthcoming." This has obviously not been the case.

We would certainly like to know how much longer the Board plans on delaying in deliberating this case. We would appreciate hearing from you as to the status of the case.

Sincerely,

John Truffa
International Representative
Region 4, UAW

JT:ee
opeiu494

cc: P. Connelly

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

January 31, 1984

Re: Impact Industries, Inc.
Case 33-CA-4847, et al.

John Truffa, International Representative
International Union, United Automobile,
Aerospace & Agricultural Implement
Workers of America (UAW)
Region No. 4, UAW
5132 West Harrison Street
Chicago, Illinois 60644

Dear Mr. Truffa:

This will acknowledge your January 25, 1984, inquiry regarding the status of the above case.

The Board regrets the delay in processing this case. However, in addition to complex legal and policy issues regarding the circumstances under which a bargaining order is appropriate, delays in case processing have resulted from turnover in Board membership. When I responded to your previous inquiry in August 1983, I had hoped that a decision would have issued by this time. Unfortunately, these hopes have not been realized. Nevertheless, although I am still unable to provide you with an exact date, the case is being actively considered and I hope that a decision will be forthcoming without too much further delay.

Very truly yours,

Joseph E. Moore

Joseph E. Moore
Associate Executive Secretary

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

FEB 23 1984

February 21, 1984

Re: Impact Industries, Inc.
Case 33-CA-4847, et al.

Honorable Barney Frank
U. S. House of Representatives
Chairman, Manpower and Housing Subcommittee
of the Committee on Government Operations
Room B-349-A Rayburn Office Building
Washington, D. C. 20515

Dear Congressman Frank:

This will acknowledge your 3 February 1984 inquiry regarding the status of the above case.

As noted in your letter, this case has been pending before the Board since May 1982, when Respondent Employer filed exceptions to the Administrative Law Judge's Decision and Order. This case raises complex legal and policy issues with respect to the appropriateness of a bargaining order under the Supreme Court's Decision in NLRB v. Gissel Packing Co., Inc., 395 U.S. 574. In addition, the issue with respect to the discharge of 11 of the 12 alleged discriminatees referred to in your letter involves their status as illegal aliens. As you may know, the lawfulness of the discharge of illegal aliens under the National Labor Relations Act is presently pending before the U. S. Supreme Court in Sure-Tan, Inc. & Surak Leather Company v. NLRB, which was argued before the Supreme Court in December 1983. A decision in Sure-Tan is expected before the Court adjourns in June 1984.

In light of the issues involved, and particularly since a substantial portion of the instant case may hinge on the Supreme Court's action in Sure-Tan, the Board has decided to hold this case in abeyance pending the Court's decision in Sure-Tan.

I trust that the above is responsive to your inquiry. Please let me know if I may be of further assistance in this matter.

Very truly yours,

Joseph E. Moore

Joseph E. Moore
Associate Executive Secretary

BARNEY FRANK, MASS., CHAIRMAN

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NINETY-EIGHTH CONGRESS
Congress of the United States
House of Representatives
MANPOWER AND HOUSING SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-349-A
WASHINGTON, D.C. 20515

RECEIVED
MAR - 5 1984

February 29, 1984

Polly Connelly
National Coordinator, Region 4
United Auto Workers
5132 West Harrison
Chicago, Illinois 60644

Dear Ms. Connelly:

Enclosed please find a response from the National Labor Relations Board to your inquiry made on Case No. 33-CA-4847.

The letter provides no new information, but I'm hopeful that my expression of interest will cause the Board to settle this matter in the near future.

As Chairman of the Manpower and Housing Subcommittee, the length of time allowed to elapse before final decision is of grave concern to me, and is a matter I intend to monitor closely.

If I can be of further assistance in this or any other matter, please do not hesitate to contact me.

Barney Frank
Chairman

BF/MBC/bz

Solidarity House
8000 EAST JEFFERSON AVE.
DETROIT, MICHIGAN 48214
PHONE (313) 926-5000

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW

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Telephone 379-7200
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W. G. STEWART, Director
REGION 4, UAW
5132 W. HARRISON
CHICAGO, ILLINOIS 60644

September 23, 1986

Mr. Joseph E. Moore
Associate Executive Secretary
National Labor Relations Board
Washington, D.C. 20570

RE: Impact Industries, Inc.
33-CA-4847

Dear Mr. Moore:

Could you kindly advise the status of the captioned case?

Sincerely,

Polly A. Connelly

Polly A. Connelly
International Representative

PAC:pd
opeiu494

cc: File Copy

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

6 October 1986

Re: Impact Industries, Inc.
Case 33-CA-4847

Ms. Polly A. Connelly
International Representative
International Union, United Automobile, Aerospace
& Agricultural Implement Workers of America, UAW
5132 West Harrison Street
Chicago, Illinois 60644

Dear Ms. Connelly:

This will acknowledge yur 23 September 1986 inquiry regarding the status of the above case.

The Board regrets the delay in processing those cases. I wish that I were able to provide you with a concise and lucid explanation as to why this case, as well as other cases which pose non-routine issues, have required considerably more time to decide than the average case. Unfortunately there is no single reason why this and other cases have gone well beyond the median time for deciding cases. Rather the explanation lies in a variety of reasons including the complexity of the issues, the existence of issues which have divided the Board, and, of course, the debilitating effects of turnover in Board membership on the Board's case handling system.

This case is under intensive consideration, however, and although I cannot provide you with an exact date, I anticipate that a decision will be forthcoming without too much further delay.

Very truly yours,

Joseph E. Moore

Joseph E. Moore
Deputy Executive Secretary

Solidarity House
8000 EAST JEFFERSON AVE.
DETROIT, MICHIGAN 48214
PHONE (313) 926-5000

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW

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W. G. STEWART, Director
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CHICAGO, ILLINOIS 60644

October 20, 1986

Honorable Barney Frank
U. S. House of Representatives
Chairman, Manpower and Housing Subcommittee
of the Committee on Government Operations
Room B-349-A Rayburn Office Building
Washington, D.C. 20515

RE: Impact Industries
Case: 33 CA 4847

Dear Congressman Frank:

In 1984, you made an inquiry on the captioned case which was most appreciated. Mr. Joseph Moore indicated the Board was waiting for the Supreme Court's decision in Sure-Tan, as attached.

I do not know if this matter came up in your July 1986 hearings but it is worthwhile to note the Board still has not decided. Mr. Moore's 1986 rationalization is attached.

The award being contested concerns the discharge of 11 employees, some of whom were undocumented, and the back pay estimated to be $100,000.

The Board's lack of response to this is just not good public policy.

Thanking you for your interest in this matter.

Sincerely,

Polly Connelly

Polly Connelly
International Representative

PC:pd
opeiu494
Encl.
CC: File Copy ✓

Senator **Kennedy**. Let me ask Mr. Salinas what kind of deterrent effect have the findings against your employer provided? Have they been effective at all?

Mr. **Salinas**. Not at all. Time and time again, the company with this patron mentality thinks to be over the law here in this country. And again, every time we try to start from ground zero, we find ourselves confronted with the same tactics where we on one side are covering ourselves with the law, and we have to start again. It is not fair that the one man/one person vote, and where you depend on that vote, and it is not fair that you have to prove yourself time and time and time again from a much weaker position every time.

The mentality has not changed. The ways that they have operated have not changed. Their plants have been renovated. They have invested in equipment. And the supervisors' way of dealing with the union has not improved at all.

Senator **Kennedy**. What is the mood of the workers themselves now? Are they frustrated by this whole experience?

Mr. **Salinas**. When you are in a job where you have to spend 12 hours a day, 6 days a week, unloading trucks and in the kinds of conditions that I mentioned, there is not much to talk about; there is a lot to think about. The workers, any time we come around, have something real to talk about. But it is right away cut off.

Right now, they are very frustrated. If I am frustrated, what I went through in the whole process, would I have anything to do with the union, and I came aboard, and from there on stuck to it, I can imagine what those people went through who lost their jobs and had to look for a different way of improving their lives and trying to protect each others' futures.

Senator **Kennedy**. Let me ask Ms. Kitzky, do you think that any of the remedies and penalties of the NLRB have provided any deterrent effect whatsoever on the anti-union behavior of Impact Industries?

Ms. **Kitzky**. No, because I think it just encourages them to repeat it again, because they have not received any reprimands or anything else out of this.

Senator **Kennedy**. So they think they've got a blank check, effectively; they think they can continue their anti-union activity, and there is no penalty to them?

Ms. **Kitzky**. No. They have not received anything, and we have nothing either.

Senator **Kennedy**. You indicated that Impact Industries has argued that because of the delay by the Board that they should not have to bargain with the union. That is an interesting irony. They just delay it so long, and then they try and come back in and say, well, it has been delayed so long that there ought to be another election.

If the Board were to decide a new election was proper, in this case, what would be your reaction?

Ms. **Kitzky**. For a new election?

Senator **Kennedy**. Yes.

Ms. **Kitzky**. I think the people would be very down on it, because they realize now that the system does not work, and they know that if they had a new election that the company has more or less been given a free rein to do all their firings and everything that they did before. They never got any penalties out of it, so they will be able to go right through it again like they did before and tie it up in court for possibly another eight, ten years.

Senator KENNEDY. So they would be very discouraged, to say the least.

Ms. KITZKY. Yes. They would probably laugh if anybody even mentioned it.

Senator KENNEDY. Well, thank you very much. I think you have made a very important case that even when the workers have had the election and followed the rules, that the companies have been able to use delays and other techniques to frustrate the will of the workers and frustrate the ability to organize and represent the people. And I think you have given us very explicit details, factual details, of what the impact of those delays have been upon the workers themselves.

I think it is really an outrageous condition which exists, and there have to be some changes. We will certainly try and work closely with you and others to try and see what we can do legislatively to deal with this. Of course, I think a lot of it has to do with changes in the Board itself. We need a Board that is concerned about really protecting the rights of workers and being more aggressive in pursuing those violations. I think clearly, that is one factor, but I think there are other factors as well, and things we have to do legislatively so that they cannot do this.

There is a system of laws, and if the laws require action and the workers follow those laws, then they ought to be implemented no matter who is running the Board. What we will be looking at is trying to find ways of dealing with the laws and changing the laws to respond to these needs. Hopefully, we will have more effective laws and a more effective and sympathetic Board in the future; we will work on both.

We want to thank you. We will follow your careers, and I hope you will keep in touch with me and my staff and let us know if there are any recriminations against you for your appearance here today. We will look into the individual cases that you have before the Board and see what we can do to help.

Thank you very much.

The third panel this morning includes two distinguished scholars of industrial relations, Professor Myron Roomkin, who is on the faculty of the J.L. Kellogg Graduate School of Management at Northwestern University; and Professor William Cooke, who teaches at the graduate business school at the University of Michigan, and is also co-Director of the Joint Labor-Management Relations Center at the University.

We will start off with Professor Roomkin.

STATEMENTS OF MYRON ROOMKIN, PROFESSOR OF HUMAN RESOURCES MANAGEMENT, NORTHWESTERN UNIVERSITY, EVANSTON, IL; AND WILLIAM N. COOKE, ASSOCIATE PROFESSOR OF INDUSTRIAL RELATIONS, SCHOOL OF BUSINESS ADMINISTRATION, UNIVERSITY OF MICHIGAN, ANN ARBOR, MI

Professor ROOMKIN. Thank you.

I am Myron Roomkin of the Kellogg Graduate School of Management at Northwestern University, and I want to thank you for this opportunity to be part of these hearings.

I want to talk to the Committee today about some research that I did in conjunction with Professor Richard Block of Michigan State University.

Most of the statistical research on NLRB elections have documented quite conclusively that there is a statistical relationship between delay and the outcome of a representation election. The interesting question has always been: Why?

We have heard some testimony here today suggesting that it has to do with employer activities that are obviously in violation of the spirit of the law, if not the law itself.

To look more closely at this, the research I conducted examined virtually all of the single union elections conducted by the National Labor Relations Board between July of 1972 and September of 1978. It was hoped by using such a large data base, we might be able to disaggregate the particular data and get some insight into the causality that exists between delay and outcome.

I have provided the Committee with a copy of that research so that it can study it more closely at its leisure, and I would like to summarize what I think are its major findings.

In elections won by unions, it takes on average 1.9 months to conduct an election after the petition is filed. In elections that are ultimately lost by the union, it takes 2.2 months.

This finding is significant not only statistically but substantively. That translates into ten days. We all know, and at least we believe it to be true, that an employer seeking to defeat a union organizing campaign might cause excessive, unreasonable and unnecessary delays—in short, abuse the process and influence the outcome. It is another thing to find that in elections that are delayed or postponed for just take a couple of days—even for justified and bona fide reasons—the outcome is affected.

The question, then, why is this the case. We found other findings that gave us hints. We found that delay was correlated with size and quite interestingly, we found that delay was correlated with plurality.

We also found that the typical absolute number of votes separating a union win from a union defeat was six.

Putting this all together, we fashioned a story that made sense, given the pattern in the data. The labor movement has always said that delay is associated with union loss because it is harder to keep the union majority together; turnover and other acts of attrition result in a union loss.

The employer alternatively argues that what we are really seeing in the relationship between delay and outcome is sensible employees learning the truth and changing their allegiances.

I do not think either one of those stories is the complete story of what is taking place, because they say very little about the relationships between delay and plurality, delay and size, and delay and outcome.

The theory that Block and I have proposed, in summary form, goes something like this. Once an employer takes note of an organizing campaign, it tries to identify the sympathies of the employees—who are the union sympathizers, who are the company sympathizers, and most important who are the undecided voters. The employer focuses on the undecided workers because the outcome of the election will turn on a handful of votes. Remember, only six votes on average are required to convert a union victory into a union defeat.

Equally important, it is probably easier to influence voters who are "at the margin" than those who already have made up their minds. The longer it takes to hold the election, even small amounts of delay—and here we are talking about days—the more time the employer has to identify these swing voters.

From the employees' perspective, being a swing voter is no protection from reprisals. If they participate in the election, the employer and fellow workers are going to have a fairly good idea how they voted in the outcome. The simplest thing, then, is not to participate.

In short, delay causes potential union voters to stay away from the polls.

We provide some additional statistical evidence of this in correlational studies that are also appended to my testimony. We think that this explanation has certain important qualities.

First, it says nothing about the animus of employers. Employers may very well in the main be following the law. The small increments in case processing time can come about from a variety of sources and from any of the actors in the process—the Board, the unions and the employers themselves.

This study, like any statistical study, has its limitations, of course. For one, the results reported here are from data that are over ten years old. I doubt seriously, given the kinds of changes that have taken place at the Labor Board in the last few years, that we could get a fair test of this hypothesis, because current evidence indicates that organizing practices have changed dramatically. We know, for example, that the labor movement would rather not take a case before the Labor Board and would prefer to have the vote monitored by an independent third party.

It is for that reason, and others, that I am happy that the Committee will hear both from the academicians and the people who have to live under these procedures.

Let me, if I might, just turn my attention to the "So what?" and the public policy implications of this research.

The important point I would like to make today is my endorsement of speedier elections. The Board prides itself on getting most of these elections done within what it considers to be reasonable time frames, using normal standards of administration in the Federal sector. I think speedier elections are required.

I would like to endorse the notion of the speedy election that is practiced in some parts of Canada, where elections are held within five days. A five-day period to election, I think, gives the employer ample time to make its case, to try and bring information to the voters.

It has been argued that five days is not enough time to hold a hearing on what constitutes a proper election district. I think that is false, because we could hold the election first and then deal with the problems of contested election districts. The question of worker eligibility to vote also could be addressed after ballots have been cast, but before they have been opened.

Only under these kinds of procedures, sir, do I think that workers who want to participate in the process will have the opportunity to participate.

I would be happy to comment on any of this research in greater detail.

Senator **Kennedy**. Thank you.

[The prepared statement of Professor Roomkin, with an attachment, follow:]

Testimony of Professor Myron Roomkin*
before the U.S. Senate
Committee on Labor and Human Resources,
Labor Subcommittee

February 5, 1988

Thank you very much for this opportunity to be a part of these hearings.

This testimony deals with the role of delay in the process of union formation under the procedures of the National Labor Relations Act. In particular, it concerns the statistical research Professor Richard Block of Michigan State University and I conducted on how preelection delay affects the likelihood a union will win a representation election.

Delay As A Concept[1]

There has been a longstanding consensus that our national labor policies require expeditious case processing and that unnecessary delays are inconsistent with those goals. In disputes ranging from employer discrimination against employees for union activities to those against unions for illegal economic coercion, the basic assumption has been that justice delayed is justice denied. However, a distinction could be made between delay in an adjudicatory procedure and delay in a union representation election. In a case in which the National Labor Relations Board is asked to choose between two contesting claims, the side that loses may be forced to tolerate unsatisfactory conditions until the agency makes up its mind or appeals have been exhausted. In such cases, the inadequacies of the Board's compensatory and remedial powers do in fact impose a cost upon parties, even if their claims are upheld. The longer the process, the greater the cost.

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*Professor of Human Resources Management, J.L. Kellogg Graduate School of Management, Northwestern University.

[1] Delay, of course, is a normative concept. In an adversarial proceeding, one party's wait can be the other's appropriate exercise of due process. Perhaps a better concept is case-processing time.

Alternatively, in a representation election, the Board creates a process and serves as an adjudicator only if needed. If the process is protracted, it does not necessarily follow that the Board is imposing a cost on employees for they will ultimately get an opportunity to vote. From this perspective, postponed elections are not a denial of rights but merely the delay of an election.

Unfortunately, and quite significantly, the research I wish to report today contradicts this view. Case-processing time affects the outcome of elections by systematically reducing the likelihood that a union will win an election. And even more important, election outcomes are much more sensitive to case-processing delays than we once thought.

Some have talked about delay as a weapon. It is. However, it is the theme of this work that whether or not delay is intended as a weapon, increased case-processing time is associated with the defeat of a union in a representation election. The important question is why?

Research Findings

The evidence linking case-processing time with a lower probability of union victory is considerable. However, at the time of our research, prior studies relied upon aggregate data or summary statistics.[2] On the premise that disaggregated information might yield some insight into the processes of elections, Richard Block and I[3] examined the NLRB's case records for 45,115 single-union representations cases closed between July, 1972, and September, 1978.[4] The studied cases had the following characteristics with respect to case-processing time:

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[2] This research is reviewed in the attached papers.

-the average election was held 2.09 months after a petition was filed.

-on average, it took one month after an election to close the file.

-elections that went to hearing either before the Regional Director or the Board took on average 1.6 additional months or twice as long to close as those that do not.

-elections held in units of professional and technical employees took longer to conduct, probably because of the special election procedures governing such units, but there were not substantive differences in case-processing time among other types of units.

-the bigger the unit, the longer it took to conduct an election.

-in a typical union victory, the union won by a total of six votes.

With regard to the outcome of these elections, results were striking. On average, a union victory took 1.9 months to go from petition to closing. But the average union defeat took 2.2 months, or just 10 days more.[5]

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[3] Myron Roomkin and Richard Block, "Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence," University of Illinois Law Review, Volume 1981, Number 1, 1981, pp. 75-97.

[4] The sample did not include multiple-union elections, run-off elections, or decertification elections.

[5] Reference is made to Table 4 of the study, which shows that the cumulative distributions of case processing time for both union victories and defeats are quite comparable. Thus we are not reporting a statistical artifact in which differences at the mean reflect quite different underlying distributions in the two samples.

Moreover, delay tended to reduce the size of the victory (the plurality) when the union won, but did not affect the plurality in an election won by the employer. Last, while delay was generally associated with declines in the number of workers voting relative to those who were eligible to vote, delay was also associated with lower turnout in union victories than in union defeats.

All of this suggests that we have not fully recognized the potency of delay in the election process. It is one thing to say that an employer could increase its chances of defeating a union organizing drive by causing excessive, unreasonable, and unnecessary delays--in short, by abusing the process. However, it is quite another thing to recognize that delays in the election process of very short duration, probably due to bona fide reasons, can also so strongly affect the outcome of an election and the willingness of workers to exercise their rights.

How Does Delay Influence Voting?

Organized labor and employers' groups have tried to explain why delay is correlated with election outcomes. The labor movement has tended to explain the impact of delay on union defeats by noting that with the passage of time, it is more difficult to hold together a prounion majority. In labor's view, as the case drags on, employees leave the company either through voluntary turnover or employer intimidation. There is probably some truth in this explanation, but it does not explain, in the absence of intimidation why turnover would be greater among union sympathizers than among those who would not vote for the union.

Employers, for their part, say delay is associated with a lower likelihood of union victory because the added time gives workers an opportunity to reassess their true allegiances. If, as survey data show, most workers fundamentally trust their employers, then the signing of an authorization card could be interpreted as a warning or an act of protest. Time, therefore, works in the employers' favor as they try to win back the loyalties of their employees.

The major problem with both of these explanations, however, is that they do not deal with all of what we know about case-processing time and election outcomes. A fuller explanation should have something to say about why delay affects the margin of victory, why this impact on the plurality is not equal in union victories and union defeats, why delays tend to be greater in larger units, and why delays affect the level of participation in elections.

One plausible explanation that does address all these facts is the following: Once an employer takes note of an organizing campaign, he or she tries to identify the sympathies of the employees--who are the union sympathizers, the company sympathizers, and most important, the undecided voters. The employer focuses on the undecided workers because the outcome of the election will turn on a handful of voters. (Remember, only six votes on average are required to convert a union victory into a union defeat.) And equally important, it is probably easier to influence voters who are "at the margin" than those who already have made up their minds. The longer it takes to hold the election, even small amounts of delay, the more time the employer has to identify the swing voters.

From the employees' perspective, being a swing voter is no protection from reprisals. If they participate in the election, the employer and fellow workers are going to have a fairly good idea which way they voted. The simplest thing then is to not participate.

In short, delay causes potential union votes to stay away from the polls.

Block and I provide additional support for this explanation in another paper[6] in which we argue that margin of victory, regardless of who wins, is inversely related to voter participation in the election. This suggests that abstaining voters are to some extent "free riders" who refrain from voting if they think that their vote will not affect the outcome of the election.

As an explanation, the theory stated above has one important quality. It is not necessary to conclude that employers are purposefully using the machinery of the NLRB to subvert employee rights. The small increments to case-processing time found to be so important can come from many sources and from any of the actors—government, unions, and employers.

This study, like any statistical work, has limitations. For one, the results reported here are from data that are more than ten years old and should be replicated on more recent experience. While we are confident that the findings would still hold, we must recognize that the relationship between the Board and the unions has changed significantly during the 1980s. It is not clear, for instance, whether the cases that have gone to elections in the past ten years are representative of organizing activity during that period. A strong argument could be made that the newer cases are qualitatively different and that the process of organizing workers has also changed.

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[6] Richard N. Block and Myron Roomkin, "A Preliminary Analysis of the Participation Rate and the Margin of Victory in NLRB Elections," Proceedings of the Thirty-Fourth Annual Meeting of the Industrial Relations Research Association, Madison, Wisconsin: IRRI, pp. 220-26.

Moreover, we must remember that this is a statistical study that relies upon averages, relationships, and inferences. Such an inquiry can be suggestive and helpful in fashioning public policy, but it is not a substitute for testimony from actual workers who must bear the real consequences of delay. It is for this reason that I am glad the Committee will hear from both academicians and workers.

Policy Recommendations

Historically, we have taken pride in the high level of voter participation in representation elections, which far exceeds the level of participation in political elections. If, as argued, participation is adversely affected by delay, what can public policy do to give workers an opportunity to choose whether or not they desire union representation? Public policy can not require workers to vote. Instead, the procedures should be reformed to minimize the opportunity for an employer to scrutinize its employees during the election process.

One option, used in British Columbia, grants a union certification on the basis of signed authorization cards. However, such an approach is not consistent with our commitment to either fair play or the employers' right to inform their employees. Even more important, signing an authorization card is not the same as voting for a union in an election. Card signing can involve intimidation and misinformation, and is a public event in which workers know the identity of those who have or have not already signed.

A better alternative is the expedited or "speedy" election, in which workers are given quicker access to the voting booth to avoid the employer's scrutiny, and which was introduced in the unpassed Labor Law Reform Act. Under these procedures, an election is held within a few days of a petition, perhaps as few as five to ten. Interestingly, the last few versions of the Labor Law Reform Act had increased the time requirements for such elections to thirty and then thirty-five days. At that point, given the theme of the research discussed above, we should ask ourselves, "Why bother?"

Speedy elections have been criticized because they may not allow employers an opportunity to bring their message to employees. However, a campaign as currently practiced can be accommodated within these legislatively mandated periods.

Another criticism is that speedy elections will not permit the Board to rule on the propriety of the election district and the eligibility of employees to vote. This also is not true for both of these issues can be addressed after workers have voted but before ballots are opened and counted.

Whether or not Congress requires this new approach to representation elections, it is very clear that the National Labor Relations Board must be given the resources and the will to shorten the time from the filing of petitions to the casting of ballots. If you believe as I do in the right of workers to choose or not choose union representation, then we must move now to reaffirm our commitment to that principle.

CASE PROCESSING TIME AND THE OUTCOME OF REPRESENTATION ELECTIONS: SOME EMPIRICAL EVIDENCE

*Myron Roomkin**
*Richard N. Block***

I. INTRODUCTION

Both the National Labor Relations Board (NLRB) and the parties involved are concerned with delays in the processing of representation cases. The NLRB's commitment to improving case processing speed has historically been anchored in the conviction that unnecessary delays are incompatible with the rights and obligations created by the National Labor Relations Act. This commitment to effective administration, however, has not been based on a statutory requirement that the Board safeguard the constitutional due process rights of employers or unions. In fact, the statute does not set down time limitations which the Board must meet.[1] Nor have courts been particularly desirous of penalizing the Board for delays, perhaps because the Board does not distribute a public benefit such as a pension or other entitlement.[2] Indeed, the Second Circuit indicated that although the Board should justify a lengthy delay between the time of a hearing and the issuance of an order, no time limit exists within which the Board must act.[3] Although one court required the Board to reasonably expedite the processing of the case,[4] another court held that the passage of time does not justify denying the enforcement of NLRB orders.[5]

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* *Associate Professor of Industrial Relations and Urban Affairs at the J.L. Kellogg Graduate School of Management and Assistant Director, Center for Urban Affairs and Policy Research, Northwestern University. B.S. 1967, Cornell University; M.S. 1969, Ph.D. 1971, University of Wisconsin.*

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The authors would like to thank Benjamin Wolkinson and the members of a faculty seminar in the School of Labor and Industrial Relations at Michigan State University for comments on an earlier version of the paper. The authors would also like to thank Zeena Young for her research assistance on the study of party-induced delay and Martin Schne[illegible]sistant to the Regional Director, National Labor Relations Board, 13th Region, Chicago, Illi[illegible], for his cooperation.

[1] *See* National Labor Relations Bd. v. Pyne Molding Corp., 226 F.2d 818 (2d Cir. 1955); Southland Mfg. Corp. v. National Labor Relations Bd., 475 F.2d 414 (D.C. Cir. 1973). Section 10(b) of the Act establishes a six month statute of limitations for the filing of unfair labor practice cases and has been enforced by the courts when the Board has disregarded the provision. *See* Local 1424, Int'l Ass'n of Machinists v. National Labor Relations Bd., 362 U.S. 411 (1960).

[2] Fifth amendment guarantees to due process have been established in agencies in which public benefits and welfare are dispensed. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

The Board has also become increasingly concerned with case processing from the perspective of public administration and administrative efficiency. The productivity of all regulatory agencies has become, and is likely to remain, an important public policy goal in the face of diminished public resources and a desire to control federal employment and spending. Acting in this spirit, the chairman of the NLRB formed a task force of public members and directed it to recommend ways of streamlining Board procedures.[6] The Board's experience in recent years, moreover, demonstrates an apparent ability to dispose of a record volume of unfair labor practice and representation cases with increasing speed.[7] Continued attempts to reduce the time required internally for processing cases in the face of likely reductions in the Board's professional staff, however, could pose a threat to the optimal protection of the parties' rights.[8] Additionally, for some, delay serves strategic purposes and therefore would be unaffected by further streamlining in Board process.[9]

The use of delay as a strategic activity should not surprise those parties who have long contended that the union's chances for obtaining certification are reduced when the election is postponed.[10] According to conventional wisdom, the passage of time makes it more difficult for the union to retain the loyalties of workers because delay gives employers added opportunity to dissuade employees and increases the likelihood of turnover in the workforce. Although little published material provides convincing evidence that lawyers and other consultants advise their clients in representation proceedings to stall intentionally,[11] the effectiveness of this tactic remains a widely accepted part of industrial relations folklore. Accordingly, persons in the labor movement are staunch advocates of improving the administration of the NLRB. Labor's efforts to enact the Labor Reform Act of 1977[12] and obtain so-called "speedy elections," as well as the strenuous resistance to that law by the business community, resulted in part from the parties' recognition that time had strategic importance in election cases.

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[3] National Labor Relations Bd. v. Isthmian S.S. Co., 126 F.2d 598 (2d Cir. 1942).

[4] Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961).

[5] National Labor Relations Bd. v. Coca-Cola Bottling, 472 F.2d 140 (9th Cir. 1972).

[6] CHAIRMAN'S TASK FORCE, REPORT AND RECOMMENDATIONS OF THE CHAIRMAN'S TASK FORCE ON THE NLRB FOR 1976.

[7] *See* text accompanying note 24 *infra*.

[8] *See, e.g.*, Address on Major Issues Facing NLRB by Board Member Don A. Zimmerman, [1981] DAILY LAB. REP. (BNA) D-1, No. 49 (Mar. 13, 1981).

[9] Gomberg & Samoff, *Improving Administrative Effectiveness of the NLRB*, 24 LAB. L.J. 201 (1973). *See also* Wolkinson, *The Remedial Efficacy of NLRB Remedies in* Joy Silk *Cases*, 55 CORNELL L. REV. 1 (1969).

[10] S. BARKAN, THE DECLINE OF THE LABOR MOVEMENT 22 (1981); Prosten, *The Longest Season: The Union Organizing Record in the Last Decade a/k/a How Come One Team Has to Play with its Shoelaces Tied Together?*, in 31 PROC. ANNUAL MEETING OF THE INDUS. REL. RES. ASS'N 240 (Chicago, Ill., Aug. 29-31, 1978); Barban, *Organization of the Unorganized*, in 9 PROC. ANNUAL MEETING OF THE INDUS. REL. RES. ASS'N 232 (Cleveland, Ohio, Dec. 28-29, 1956).

[11] *See, e.g.*, Imberman, *The Hocus Pocus in Union Avoidance*, 1 J. LAB. RES. 275 (1980), which lists a large number of employer tactics and counter-tactics without identifying unjustified delay. For an exception to the rule in Wolkinson, see note 9 *supra*, at 32-33.

The weight of empirical evidence supports the proposition that processing time is a determinant of election outcomes. One study found an average drop-off in union victories of 2.5% per month for elections taking six months or less during the 1962-1977 period.[13] A second study that examined elections conducted between 1952 and 1972, estimated a 0.29% decrease in union victory percentages for every one day added to the median processing time for the median case.[14] The Board itself, in a 1946 analysis of consent elections in 1942, reported a drop in union victories with increases in case processing time.[15] Anecdotes about employers who have stymied organizational efforts by protracting cases well beyond "normal or average" case processing time, moreover, support the findings of these systematic investigations. One study, however, was unable to document the relationship between outcomes and processing time after examining data for 1961, but the author pointed out the need for sophisticated statistical analysis and more detailed data on aspects of delay before rejecting this well established belief.[16]

The recent availability of detailed administrative records of the NLRB in election cases, in the form of magnetic tapes, now allows closer study of election case processing and its relationship to the outcome of elections. By relying on official records, however, the amount of information on an election is limited to the data preserved by the Board. But at the same time, because the official records preserve data on a case-by-case basis, researchers can analyze the record of each case separately. This article reports the results of disaggregated analysis of the Board's election case processing based on these newly available official records. Because of the high level of disaggregation, the analysis uncovered patterns in case processing time heretofore masked by the aggregate statistics reported by the Board. Before discussing the results, however, this article summarizes the nature of case processing in representation cases and the origins of delay in those proceedings.

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[12] H.R. 8410, S. 2467, 95th Cong., 1st Sess. (1970).

[13] Prosten, *supra* note 10.

[14] Roomkin & Juris, *Unions in the Traditional Sectors*, in 31 PROC. ANNUAL MEETING OF THE INDUS. REL. RES. ASS'N 210 (Chicago, Ill., Aug. 29-31, 1978).

[15] National Labor Relations Bd., *Studies of the Results of NLRB Activities*, 1942-44 (1946), *as reported in* Moore, *Procedural Delay and the NLRB*, 20 LAB. L.J. 591, 596 (1969).

[16] Moore, *supra* note 15.

II. CASE PROCESSING PROCEDURES

In the 1950's, the Board was reputed to be one of the regulatory agencies most subject to delay.[17] The agency responded by introducing a new management system to control case processing. Notwithstanding some continued criticisms of the Board's administrative effectiveness,[18] many commentators currently consider the Board one of the best run of all the federal regulatory agencies, and find its system for controlling cases a model for other agencies.[19]

The Board's systematic management of representation cases conforms to the procedures of the representation process.[20] The representation process itself entails several steps. The filing of a petition initiates the representation case. Professional employees of the regional office then conduct an investigation. Thereafter, the Board determines an appropriate unit for an election. That determination can be made without a formal hearing in a voluntary manner by the parties and ratified by the regional director or, following a hearing, by the regional director or the Board on review. When the parties reach a voluntary agreement, they may operate under either a consent election agreement, which grants authority over any dispute to the regional director, or a stipulation for certification, which gives the Board authority to settle disputes after the regional director writes an interim award. Once a regional director (or Board) decision has been issued, a secret ballot election is conducted.[21]

To measure the regional office's performance in processing representation cases, the Board compiles data on the time a case takes to progress.[22] For cases with a hearing, the three stages separately measured are (1) from filing of a petition to notice of hearing; (2) from notice of the hearing to close of the hearing; and (3) from close of the hearing to issuance of a regional director or Board decision. For all representation cases, the two stages are (1) from filing of a petition to holding of election; and (2) from the date of objections or challenges to issuance of a Report or Supplemental Decision.

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[17] Sen. John F. Kennedy, in a 1959 speech, likened the Board's administrative performance to that of the Court of Chancery described in Dickens's *Bleak House*. COMM. ON GOV'T OPERATIONS, U.S. SENATE, IV STUDY OF FEDERAL REGULATION: UNDUE DELAY IN REGULATORY ADMINISTRATION 133 (1977).

[18] *See*, *e.g.*, Address by Former NLRB General Counsel John S. Irving, Jr., [1981] DAILY LAB. REP. (BNA) at D-1 to D-7, No. 35 (Feb. 23, 1981).

[19] DeSio & Higgins, *The Management and Control of Case Handling, Office of the General Counsel*, *NLRB*, 2 BUREAUCRAT 385-94 (1974).

[20] *See* F. MCCULLOCH & T. BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD 93-103 (1974).

[21] The Board also has the legal obligation to conduct an expedited election when there is a charge of a violation of the provisions of § 8(b)(7)(c) of the Labor-Management Relations Act, 29 U.S.C. § 158(b)(7)(c), and no other unfair labor practice charges have been filed by the union. *See* International Hod Carriers, Building & Common Laborers Union, Local 840, 135 N.L.R.B. 1153 (1962) (Blinne Construction).

[22] DeSio & Higgins, *supra* note 19.

These indicators serve as an important management tool in appraising the Board's administrative performance, planning future budgets, and providing assistance to regional offices to make administrative improvements. The Board has established a Division of Operations Management headed by an associate general counsel in Washington to operate and improve upon the management system in the six administrative districts created for this purpose, each staffed by an assistant general counsel and two deputies.[23]

This new managerial approach, along with a decentralization in 1961 that delegated authority to the regional director in representation cases, is credited with shortening the time it takes to process a representation case. For example, in the fiscal years 1958-1961, the last years before decentralization, the median elapsed time by stage was as follows:[24]

Fiscal Year	Number of Days from Petition to Close of Hearing	Number of Days from Close of Hearing to Board Decision
1958	28	54
1959	28	49
1960	24	54
1961	24	65

In the fiscal years 1974-1976, the comparable statistics were:

Fiscal Year	Number of Days from Petition to Close of Hearing	Number of Days from Close of Hearing to Board Decision
1974	22	20
1975	23	22
1976	24	23

In the period of our analysis (fiscal years 1973-1978), the overwhelming portion of elections took place in a relatively short time: 42% within one month of petition, 83% within two months, 92% within three months, and 94.5% within four months.[25] To its credit, the Board has achieved this record despite a dramatic increase in unfair labor practice cases. These cases compete with representation elections for the administrative resources of Board professionals. The Board's performance also has been achieved in the face of lagging growth in the number of professional employees relative to the agency's workload.[26]

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[23] Letter from Associate General Counsel for Operations Management, NLRB, Joseph E. DeSio, Nov. 13, 1980 (on file with the author).

[24] Data reported in N.L.R.B., ANNUAL REPORTS.

[25] *See* Table 4 *infra*.

[26] *See* Zimmerman Address, *supra* note 8. It is misleading to compare the Board's delays to those found in other regulatory agencies. According to the United States Administrative Conference, 19 months are required in the average case involving licensing and 21 months for ratemaking cases. While the Labor Board's performance is notably better, the parties can always

III. SOURCES OF DELAY

A. Delay Induced by the Parties

Case processing time may be extended or shortened either before or after an election as a consequence of actions taken by one or both of the parties. Before an election a party may attempt to delay the election by filing unfair labor practice charges or by forcing the other party to file such charges, because the Board generally will not proceed with an election if an unfair labor charge is pending. Should the charging party file a request to proceed, the Board will go forward with the election, unless the pending charge involves an employer's refusal to bargain under section (8)(a)(5) or its assistance to another union under section (8)(a)(2).

The parties' decision to forego a consent election also affects case processing time. Of those cases requiring a hearing, some obviously take longer to dispose of because they pose novel issues, issues of agency jurisdiction, or issues of policy.[27] Even an election case without these controversies, however, can become protracted when a hearing officer intervenes. A variety of problems may cause delay in the preelection stage. Parties' lawyers may fail to stipulate to uncontested facts,[28] continuances by hearing officers may be needed, and delays may be encountered in the writing and filing of post-hearing briefs or the timely receipt of transcripts.[29] Admittedly, the total addition to the processing time of the case from these sources can be measured in days, not weeks or months. Relatively small increments to case processing time, however, may have major consequences for the outcome of the subsequent election.

Once an election takes place, additional opportunities develop for extending the process. The parties may resort to the courts, or by refusing to bargain, prompt the other party to resort to the courts.[30] The parties may also delay the process by filing an objection concerning the

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utilize the added time to reach a voluntary settlement of their private disputes. Parties seeking a license cannot meet their own needs. COMM. ON GOV'T OPERATIONS, *supra* note 17.

[27] *See*, *e.g.*, Table 3, *infra*, and the accompanying text.

[28] Gomberg & Samoff, *supra* note 9, at 209.

[29] If the Board is requested to review the direction of an election, the region may still hold the election and impound the ballots pending the outcome of the Board's decision.

[30] When an employer frivolously refuses to bargain with a majority union after an election, the Board can order the employer to reimburse the NLRB for litigation expenses and the union for litigation and excess organizational expenses. National Labor Relations Bd. v. Food Store Employees Union, Local 347, 417 U.S. 1 (1974) ("Heck's"); J.P. Stevens & Co., 244 N.L.R.B. __ (1979) (Dec. No. 82); Tiidee Prods., Inc., 194 N.L.R.B. 1234 (1972), *modified sub nom.*, International Union of Elec. v. National Labor Relations Bd., 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). The Board has taken the position that the Act prohibits it from ordering the employer to reimburse the employees for what they might have gained had the employer not refused to bargain. *See* Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), *enf'd*, 449 F.2d 1058 (D.C. Cir. 1971).

conduct of the election.[31]

B. Board or Party Induced Delays: Some Correlational Results

Although one widely and long held theory of case processing time holds that the parties' actions and not the administrative apparatus or procedures of the NLRB cause the delays,[32] several commentators dispute this claim. Their counter thesis maintains that the agency may be the source of its own fate because it can influence its intake through substantive decisions and procedures.[33]

Economists and others have recognized that even an efficient adminstrative agency like the Board can contribute to delay unintentionally if its resources are stretched across larger numbers of cases.[34] This problem is a particularly relevant consideration for the NLRB, because of the way in which it organizes staff resources and plans its budget and personnel needs. At the regional office, work is organized around teams of four professionals. These teams are responsible for handling both representation cases and cases involving a charge of an unfair labor practice (charge cases).

In theory, a growing volume of charge cases will decrease the human resources available for processing election petitions.[35] In fact, the Board recognizes the interdependence of resource utilization in representation and charge costs by projecting staff needs through a formula that equates the staff requirements of a representation case with two and one-half unfair labor practice cases, not including overhead and travel costs.[36] These relationships among staff productivity measures are based on a time study taken a number of years ago and updated according to experience and estimates.[37]

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[31] In General Knit of Cal., 239 N.L.R.B. 619 (1978), the NLRB reinvoked the election standard provided in Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962):

> [A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

Id. at 224.

In adopting this standard, the Board set aside its ruling of 18 months earlier in Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311 (1977), in which it held that elections would no longer be set aside because of misleading campaign statements, whether oral or written, unless a party had engaged in deceptive practices which improperly involved the Board and its processes or the use of forged documents. In his dissent in *General Knit*, Board member Penello noted that the entire process—from Board election to a circuit court opinion on a refusal-to-bargain charge—can take nearly two years, and that the *General Knit/Hollywood Ceramics* standard encourages employers to set into motion the Board's post-election machinery so as to frustrate collective bargaining. 239 N.L.R.B. at 626-27.

[32] *See* notes 9 & 10 *supra*.

[33] *See* Irving Address, *supra* note 18; *see also* Roomkin & Abrams, *Using Behavioral Evidence in NLRB Regulation*, 90 HARV. L. REV. 1141 (1977); Roomkin, *A Quantitative Study of Unfair Labor Practice Cases*, 34 IND. LAB. REL. REV. 245 (1981).

[34] Gass, *Models in Law Enforcement and Criminal Justice*, in A GUIDE TO MODELS IN GOVERNMENTAL PLANNING AND OPERATIONS 231 (S. Gass & R. Sisoon eds. 1975).

[35] This observation was not offered as criticism of the approach, because much can be said for generalists at this level. Representation cases frequently entail charges of alleged unfair labor practices.

In a rough fashion, the relationship between Board productivity and various factors that may affect that productivity can be examined through correlations among measures of the Board's workload and administrative performance. Table 1 presents simple correlations based on fiscal years 1962-1976, a period following regionalization and the introduction of the new case management procedures, for the following variables:[38]

Median number of days from filing to notice of a hearing (DELAY 1) in representation cases.
Median number of days from notice of hearing to close of the hearing (DELAY 2) in representation cases.
Median number of days from close of a hearing to the issuance of a Board order (DELAY 3) in representation cases.
Median number of days from close of hearing to regional director decision (DELAY 4) in representation cases.
Number of professional employees employed by the Board (EMPLOYEES).
Number of unfair labor practice cases filed (ULPS).
Merit factor (MERIT).
Number of representation petitions filed (ELECTIONS).
Average unit size of a representation petition, defined as the number of eligible to vote divided by the number of petitions (SIZE).
Portion of elections cases processed as consent elections (CONSENT).

In the analysis, these factors were expressed as percentage annual changes, rather than in absolute terms, in order to offset strong trends in various aspects of the Board's operations.

According to Table 1, percentage changes in the number of professional employees, one measure of the Board's resources, are related to case processing speed. Delays are reduced at all stages when the Board is permitted to increase its labor input. This performance is impressive because Table 1 also indicates that the EMPLOYEES and ELECTIONS are negatively correlated, implying that the added productivity is obtained with proportionately fewer workers. In addition, the increases in election petitions are highly correlated with increases in the number of charge cases. This fact supports the view that election and charge cases compete for resources.

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[36] *See* DeSio letter, *supra* note 23.

[37] Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUDIES 305 (1972), concludes that 40% or approximately this same portion of the agency's resources are devoted to processing representation cases.

[38] These are taken from published sources, N.L.R.B., ANNUAL REPORTS 1962-1976, not the magnetic tapes.

Table 1

SIMPLE CORRELATIONS AMONG SELECTED ASPECTS OF NLRB OPERATIONS, FY 1962—FY 1976

(All variables are percentage changes)

	DELAY 1	DELAY 2	DELAY 3	DELAY 4	EMPLOYEES	ULPS	MERIT	ELECTIONS	SIZE	CONSENT
DELAY/1	1.00									
DELAY 2	.965^c	1.00								
DELAY 3	.817^c	.777^c	1.00							
DELAY 4	.971^c	.974^c	.774^c	1.00						
EMPLOYEES	−.782^c	−.697^c	−.648^c	−.697^c	1.00					
ULPS	−.073	−.215	.036	−.223	−.437^b	1.00				
MERIT	−.129	.052	−.069	.041	−.215	.377^a	1.00			
ELECTIONS	−.082	.201	−.028	−.222	−.451^b	.953^a	.377^a	1.00		
SIZE	−.037	.071	−.047	−.056	−.032	.377^a	−.626^c	−.452^b	1.00	
CONSENT	−.125	−.018	.097	−.093	.187	−.145	−.091	−.333	−.277	1.00

Footnotes:

DELAY 1 is median number of days from filing to notice of a hearing in representation cases.
DELAY 2 is median number of days from notice of hearing to close of the hearing in representation cases.
DELAY 3 is median number of days from close of a hearing to the issuance of a Board order in representation cases.
DELAY 4 is median number of days from close of hearing to regional director decision in representation cases.
EMPLOYEES is number of professional employees employed by the Board.
ULPS is number of unfair labor practice cases filed.
MERIT is merit factor.
ELECTIONS is number of representation petitions filed.
SIZE is average unit size of a representation petition, defined as the number of eligible to vote divided by the number of petitions.
CONSENT is portion of elections cases processed as consent elections.

[a]Significant at .10 level; [b]significant at the .05 level; and [c]significant at the .01 level.

Sources:

DELAY 1 through DELAY 4 and EMPLOYEES were provided by the Data Analysis Section of the NLRB.
All others are taken from the NLRB's *Annual Reports*.

More startling, the correlations also reveal that delays at different stages of the process are significantly and positively related to each other. This relationship could be due to many causes. The fact that delay and most of the other measures are not significantly correlated, read together with the other significant correlations, supports the allegation that the parties, not the administrative apparatus, create most of the delays.

IV. THE CHARACTERISTICS OF DELAY

The Board supplied a magnetic tape that contains data on all representation cases completed during the period July 1972 through September 1978. These data reported the following characteristics of elections: the month and year of petition; month and year of election; type of election (whether consent, stipulated, regional director ordered, or Board ordered); the occurrence of an objection and the identity of objecting party; type of unit; number of employees in the unit; number of employees who actually voted; and the ultimate winner of the election. Using these data, statistical analyses can identify characteristics of a large number of cases.

Before discussing the results, however, two caveats must be noted. First, some measurement error stems from the fact that delay was computed from the Board's records in months rather than days or weeks. Regardless of the day of the month an event occurred, the records simply note that the event occurred that month. Thus, the records give a case processing time of two months to both a case with a petition on June 30 and an election on August 1, and one with a petition on June 1 and an election on August 31. Although the maximum potential error in measuring delay is approximately sixty days, the error is not a severe problem. Because differences in the direction or size of this bias should not be systematically related to any characteristic of the election, the error in the variable should be randomly distributed across the different types of cases studied.

Second, the estimate of delay does not constitute the full time in which a union has had contact with an employer or, at least, the employees of an employer. In most cases, the filing of a representation petition requires a showing of interest by 30% of the employees in a bargaining unit, thus necessitating that the union begin its campaign prior to the filing of a petition. Undoubtedly, the data contain cases in which the union sought to organize a unit after either failing previously to secure the needed authorization cards or having received less than a majority of worker votes in an election. The petition date, however, is the first recorded contact date and is the only date available.

Table 2 reports the mean number of months from petition to election and election to closing, by selected characteristics compiled by the agency. The data are for all single-union elections closed between July

1, 1972 and September 30, 1978 or 81.5% of all closed representation cases.[39] By looking across a lengthy period, the data more accurately reflect the progress of a case, because many cases either do not reach an election or are not certified or closed during a single fiscal year period.

According to the table, failure of the parties to reach voluntary agreement on the unit and related matters extends the processing of cases noticeably. Nearly 100% more time or 1.6 additional months are needed on an average to hold an election if a case must go to a hearing before the regional director or the Board. For elections that do not result in a pre-election hearing, stipulated cases take 50% longer to complete an election and 43% longer to be closed than consent cases.

Table 2

MEAN CASE PROCESSING TIME (MONTHS) OF SINGLE UNION REPRESENTATION CASES

Fiscal Years July 1972 - September 1978

	Number of Cases in Which an Election Was Held[a]	No. of months Petition to Election	No. of months Election to Closing
All Cases	45.115	2.09	1.00
Outcomes of Election			
Union win	20.835	1.93	1.00
Employer win	24,280	2.22	1.00
Type of Election			
No Hearing	37,277	1.79	0.96
Consent	5,009	1.48	0.71
Supulated	32,268	1.84	1.00
Hearing	7,837	3.47	1.41
RD ordered	7,597	3.28	1.15
Bd. ordered	240	9.63	1.35
Expedited[b]	23	0.91	1.18
Objecting Party			
No objection	41,189	2.04	0.69
Employer	1,941	2.55	4.33
Union	1,973	2.49	3.87
Both	35	2.11	8.52
Type of Unit			
Industrial	23,262	2.18	1.12
Craft	731	2.28	0.80
Departmental	1,634	2.07	0.90
Guard	49	2.31	1.00
Prof./Tech.	1,939	2.53	0.89
Prof./Tech. & Clerical	129	3.02	1.50
Truck Drivers	4,511	1.80	0.81
Office and Clerical	3,998	1.95	0.90
Other	8,864	1.90	0.85
Unit Size (Number of Employees)			
1-10	12,636	1.75	0.70
11-20	9,450	1.88	0.91
21-30	5,476	2.03	0.99
31-40	3,577	2.12	1.06
41-50	2,469	2.16	1.11

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[39] Decertification elections and elections in which more than one union was involved were excluded in order to provide a universe of elections as uniform as possible.

51-60	1,749	2.26	1.09
61-70	1,358	2.32	1.02
71-80	1,055	2.37	1.17
81-90	857	2.35	1.22
91-100	683	2.49	1.13
101-150	2,201	2.62	1.43
151-200	1,145	2.64	1.41
201-250	643	3.07	1.35
251-300	395	2.70	2.19
301-400	577	3.16	1.56
401-500	272	3.54	1.89
501-750	274	3.33	1.90
751-1,000	127	3.59	2.73
1,001-2,000	107	4.12	2.78
2,001-3,000	18	5.11	1.45
3,001-4,000	3	2.67	0.56
4,001-5,000	2	3.00	3.50
5,001 +	1	2.00	0.00

[a] The number of cases closed during this period is negligibly larger since a handful of cases went to election before FY73 but were closed after that date.

[b] Note 18, *supra*.

Post-election objections, which were filed in approximately 10% of the studied cases, add an average of almost four months to a case. Cases in which employers file objections achieve administrative closure about one-half of a month later than cases in which unions file objections.

In the different types of units represented in the studied cases, the processing of petitions and the conduct of elections take the same amount of time with two noticeable exceptions. Going from petition to election in professional-technical and professional-technical plus clerical units takes appreciably longer than it does in units of other varieties. This time lag, however, is expected because the Act requires the Board to conduct an election among professional employees before deciding that a unit containing both professionals and non-professionals is appropriate.[40]

Of all the characteristics of cases compiled by the Board's information system, election unit size evidences the strongest relationship with case processing time. Elapsed time from petition to close of an election undisputedly grows with increases in the number of workers eligible to vote in the election. Several plausible rationales explain the strength of this relationship.

First, election procedures for larger units may be more likely to raise issues of Board policy. Although this source of delay in larger units seems justifiable, only a minority of the cases reported in the table actually result in decisions by the Board. This explanation, moreover, still fails to account for the consistent increase in case processing time as unit size increases among relatively small units (those with 100 or fewer employees). These smaller units rarely generate novel or controversial issues to the agency.

A second explanation may be that larger units are likely to entail more complex unit determination issues than smaller units, thus necessitating more time to resolve them. Some insight into this explanation may be obtained from Table 3, which presents data on average unit size by type of election. As can be seen, a strong positive relationship exists between the type of election and delay, and type of election and size. Clearly, the types of elections that entail more delay, those with a hearing or a right to appeal, also involve larger units.

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[40] Section 9(a)(3) of the Labor-Management Relations Act, 29 U.S.C. § 159(a)(3) (1976).

Table 3

Unit Size by Type of Election
July 1972—September 1978

Consent	27.5 employees
Stipulated	57.5 employees
Regional Director	67.7 employees
Board Ordered	108.7 employees[41]

Furthermore, although complex issues may be a concomitant of size, nothing suggests that a Board or regional director hearing would, by itself, contribute to a resolution of those complex issues. If anything, negotiations between the parties, rather than a formal, adversary hearing before the regional director or the Board would be more likely to result in a settlement of complex issues acceptable to all parties. While negotiations may occur in complex cases, one or both of the parties may still wish to retain the right to appeal to the regional director. Complexity per se, however, should not inevitably lead to an adversary proceeding.

A third explanation of the positive relationship between size and delay suggests that unit size, among other things, is a measure of employer size and the availability to the employer of resources to obtain delay.[42] The data strongly imply that delay is related to the type of election held. Each type of election, starting with consent elections and ending with Board ordered elections, entails a consistently greater employer investment in legal and other fees. Thus, larger employers may be better able than smaller employers to eschew voluntary settlements and seek a hearing. This explanation of the relationship between unit size and delay, while admittedly controversial, is quite plausible in view of the earlier evidence suggesting that the parties themselves can affect case processing speed.[43]

Unit size may also determine union willingness to spend resources on organizing, with larger units constituting more important organizing goals. The difference between the union's available resources and management's would still favor employers, for two reasons. First, union resources must be spread across several organizing campaigns at one time, while the employer is free to concentrate its funds and human resources. Second, the employer cannot afford to lose the election even once, whereas the union can try again at a later time.

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[41] The average unit size in expedited elections was 36.7 employees.

[42] A positive correlation between size and delay has been discovered for recognition cases in the United Kingdom. *See* Beaumont, Time Delays, Employer Opposition and White-Collar Recognition Claims: The Section 12 Results (mimeograph from Dep't of Social & Economics Research, University of Glasgow, 1980). British scholars have interpreted these size effects as an ambiguous measure of the magnitude and strength of employer resistance to unions.

[43] Certainly party-induced post-election delay is evident in Table 2.

V. THE CONSEQUENCES OF DELAY

A. *Delay and Election Outcome*[44]

Despite substantial improvement in the administration of election cases, the speed with which elections are conducted remains a significant determinant of the outcome of a representation election. Of 45,115 single-union elections conducted between July 1972 and September 1978, the cases resulting in union victories (about 46% of the total) were brought to election in approximately 1.9 months. In contrast, employer victories took roughly 2.2 months between petitions and election. Although this period of ten days might be considered short, either absolutely or by any judicial standard of delay, the F-score for the differences in the two means is a highly significant 110.9, thus suggesting that the ten-day difference is not due to chance and is significantly related to the outcome of representation elections. This result, however, raises two issues. First, why should ten days make a difference in the outcome of elections? Second, what are the characteristics of union election victories and losses that make such a relatively short period of time so important?

The cumulative and absolute distributions of delay between union victories and employer victories in Table 4 add insight to these questions. More than 80% of all single-union representation elections during this period took place within two months, more than 90% occurring within three months of petition. Thus, in more than 90% of all cases, this ten-day period is equivalent to at least a 10% increase in the time between petition and election as opposed to what this period might otherwise be. For the 80% of elections that occur within two months, this ten-day period amounts to at least a 16% increase in time between petition and election. Thus, if this ten-day period is placed not in the context of the relatively time consuming adjudicatory process applicable to a decision in an unfair labor practice case, but in the context of the relatively short representation election process, ten days is a significant period of time.

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[44] For other work on the determinants of outcomes of NLRB elections, *see, e.g.*, J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976); Krislov & Christian, *Union Organizing and the Business Cycle*, 1949-66, 36 S. ECON. J. 185 (1969); Roomkin & Juris, *supra* note 14; Prosten, *supra* note 10.

Table 4

MONTHLY AND CUMULATIVE FREQUENCY, BY NUMBER OF MONTHS, OF ELECTION CASES CLOSED, JULY 1972 - SEPTEMBER 1978

	Union Losses		Union Wins	
	Percentage	Cumulative Percentage	Percentage	Cumulative Percentage
Same month	2.3 %		2.6 %	
1 month	36.9 %	39.2 %	43.4 %	46.0 %
2 months	42.0 %	81.2 %	40.5 %	86.5 %
3 months	10.2 %	91.4 %	8.3 %	94.8 %
4 months	2.7 %	94.1 %	1.7 %	96.5 %
5 months	1.3 %	95.4 %	0.8 %	97.3 %
6 months	0.9 %	96.3 %	0.4 %	97.7 %
7 months	0.7 %	97.0 %	0.3 %	98.0 %
8 months	0.5 %	97.5 %	0.2 %	98.3 %
9 months	0.5 %	98.0 %	0.15%	98.5 %
10 months	0.3 %	98.3 %	0.15%	98.65%
11 months	0.26%	98.56%	0.1 %	98.75%
12 months	0.20%	98.7 %	0.1 %	98.85%

B. Delay and the Margin of Victory

Delay appears to affect not only the outcome of elections but also the size of the victory. Table 5 presents data for union and employer victories on the total votes necessary to win the average election, the number of votes needed to alter the outcome of that election, and the percentage of the total votes required in order to change the outcome. On average, employer victory margins as measured here are smaller than union margins of victory. Whereas almost 26% of the votes cast would have had to switch to convert a union victory into an employer victory, only 16% of the votes cast would have had to change to convert an employer victory into a union victory. Employers, therefore, win the close contests.[45]

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[45] The 16% margin of victory in employer wins is near the 19% of the voters whom Getman, Goldberg, and Herman claim are influenced by the election campaign. The overall mean for the margin of victory was 20.6%, also close to the percentage in the Getman study. *See* J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 44, at 60-64.

Table 5

VOTING STATISTICS FOR UNION VICTORIES AND LOSSES

July 1972 - September 1978

	Employer Wins	Union Wins
	Means (Standard Deviations)	
Total votes needed to win election	32.6 (85.6)	17.67 (37.7)
Votes needed to reverse outcome	9.5[a] (25.1)	5.8[b] (10.3)
Percentage of total votes[c] needed to reverse outcome	16.1 (12.4)	25.8 (16.2)

[a] The number of votes received by the employer less the number of votes necessary for the union to win the election (50% plus 1 of the votes).

[b] The number of votes received by the union less the number of votes necessary for the employer to win the election (50% of the votes).

[c] The number of votes needed to reverse the outcome as a percentage of all votes cast in the election.

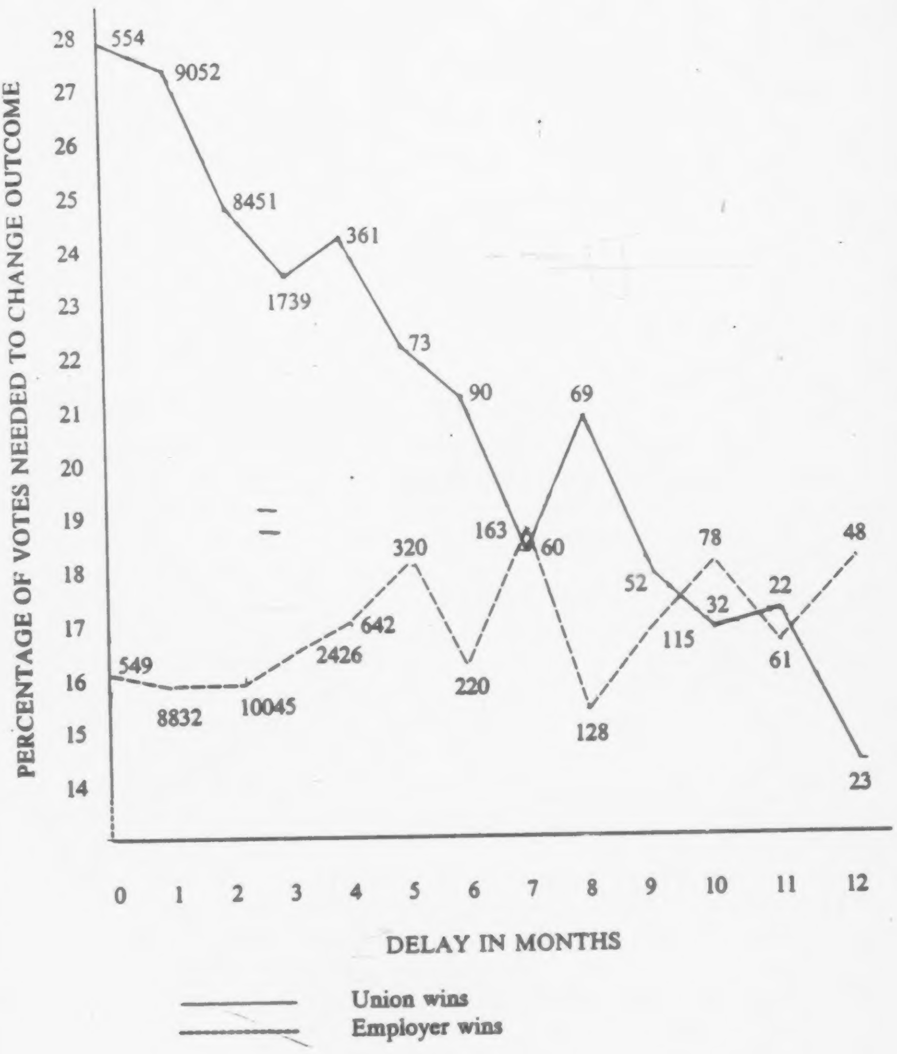
These findings linking delay to outcome imply that delay affects elections the most when the outcome is in doubt and this class of contests generally result in a vote against unionization. The impact of delay on the margin of victory, however, is asymmetrical between union wins and employer wins. As shown in Figure 1, unions' margin of victory consistently declines with delays of up to 12 months (comprising 98.85% of all union victories). By comparison, the margin of an employer victory increases up to a delay of five months (equal to 95.4% of all employer victories). Delay tends to diminish the union's majority rather than the employer's majority.

Data in Table 5 on the absolute numbers of voters who would have had to switch their votes in order to change the outcome of the elections provide further insight into the role of delay in the election process. Because of the relatively small size of the average bargaining unit (70.4 for employer wins, 39.4 for union wins), the absolute number of people who constitute the margin of victory is extremely small. For union wins, a change of only six votes would have altered the outcome. For employer wins, only nine to ten switched votes would have changed the outcome of the election. Thus, the marginal or swing component of an election tends to be small. Management's objective, seen in this light, could easily benefit from small increments to the time available between petition and election. An average added delay of 10 days, for example, is not enough time to alter the underlying sentiments

Figure 1

Relationship between Election Delay Up To 12 Months and Mean Number of Total Votes Need to Change Outcome as a Percentage of Total Votes Cast; Cases Closed July 1972-September 1978

(numbers on plane are number of observations associated with each point)



of the workforce, but could be profitably used by focusing on the workers at the margin. This delay may give employers greater opportunity to identify and influence the borderline voters.

C. Delay and Voter Participation

Public policy under the National Labor Relations Act has sought to provide individuals with an opportunity to secretly express their true sentiments once provided the necessary information on which to base a judgment. Public policy has also sought to guarantee that all workers entitled to vote are enfranchised and to preserve the legitimacy of the voting process.[46] The focus, in short, has been on voters and voting. The fact that about 90% of all eligible voters actually voted—a percentage clearly greater than found in political elections—has been a source of pride to labor regulators and evidence that the focus of policy is proper and effective.

Yet, as reported in Table 6, the portion of eligible employees casting a ballot tends to decline as more time elapses between the time of the petition and the election. Equally noteworthy is that as delay grows, turnout declines faster in union victories than in union defeats. This finding is surprising, for employers often claim that more time is needed to more completely communicate with workers. If anything, one might anticipate a stronger turnout if workers have been exposed to information for long periods. Given the relationships among delay, the likelihood of union victories, unit size, and the margin of victory, the discovery of lower voter turnout in longer elections complicates the story and suggests that nonvoting may not be the unbiased behavior that current policy considers it.

According to Table 6, the number of nonvoters in absolute terms is large enough to potentially dilute the winner's plurality or even alter the outcome. On the highly liberal assumption that all nonvoters would vote against the winner, most of the employer victories in elections taking different amounts of time would remain with the employer but by pluralities ranging from .05 to 2.6 votes. Union victories, however, would be reversed in elections transpiring after three to four months. Thus, even though voter turnout is high from one perspective, nonvoting workers, although few in number, are of considerable potential importance to outcomes, especially to the unions.

Although new standards need not be promulgated to regulate nonvoting, more should be learned about who abstains, why they abstain,

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[46] *See, e.g.*, Bok, *The Regulation of Campaign Tactics Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

Table 6

SELECTED VOTING STATISTICS FOR SINGLE-UNION ELECTIONS: JULY 1972—SEPTEMBER 1978

Number of Months Petition to Election	Average Number Votes Needed to Win		Mean Percentage of Eligible Voters Voting		Mean Votes Needed to Change Outcome (Percentage of Votes Needed to Win)		Needed to Change Outcome Minus Not Voting	
	Union Win	Employer Win	Union Win	Employer Win	Union Win	Employer Win	Union Win	Employer Win
Same Month	18.9	26.2	90.6	89.6	5.4(27.9)	7.1(16.0)	2.0	1.3
1	12.2	24.0	90.7	90.4	5.0(27.5)	6.9(15.9)	2.2	2.1
2	15.1	34.9	89.8	90.1	6.0(24.8)	10.2(15.9)	1.8	2.7
3	18.8	42.7	88.2	89.1	6.9(23.5)	12.5(16.5)	− 1.3	2.3
4	21.2	45.3	86.1	96.8	7.6(24.3)	14.0(17.1)	0.2	0.5
5	25.8	37.1	86.9	87.6	6.5(22.2)	10.8(18.0)	− 4.2	0.5
6	33.0	48.3	83.3	86.9	8.1(21.3)	15.2(16.3)	− 2.8	0.9
7	28.5	34.8	84.9	86.8	7.1(18.3)	11.7(19.6)	− 3.8	1.4
8	26.9	47.5	86.1	88.3	7.2(20.9)	13.3(15.5)	− 8.3	1.2
9	38.4	40.0	82.4	86.9	9.0(17.8)	11.3(16.8)	−10.0	−0.4
10	43.5	58.2	86.1	87.4	8.8(16.8)	17.6(18.0)	− 9.0	1.2
11	43.7	58.3	83.5	85.9	21.3(17.2)	18.0(16.7)	0.3	−0.8
12	48.6	44.1	90.5	83.4	11.2(14.5)	14.6(18.1)	−11.0	−2.5

and how these abstentions vary with increments in election delay.[47] While this article presents no answers, a few hypotheses seem apparent and should be explored.

First, some of the nonvoters probably represent normal employee attrition and turnover between the time the *Excelsior* lists[48] are compiled and votes are actually cast. Newer employees would be less likely than more senior employees to have a preference with respect to unionization of their current employers. For this reason, nonvoting could be expected to increase with pre-election delays in case processing. But logically, this source of turnover should not fall unevenly on union-won elections and employer-won elections.

A second group of nonvoters are truly uninterested in the outcome of the campaign. Considering the significance of unionization, however, this group is unlikely to be very large or larger in union wins and smaller in employer wins.[49]

A third reason that workers may not vote in representation elections is that they are averse to risk, and do not want to risk the enmity of either the employer (if they vote in favor of the union and the employer loses) or their fellow employees (if they vote in favor of the employer and the union loses). If these workers are in fact not disinterested in the outcome of the election, they still may vote only if they believe that their vote will have no effect on the outcome of the election.

The existence of these "free riders" depends on two factors: (1) that the nonvoter can accurately predict the outcome of the election if he or she does not vote, and (2) that the employer and/or fellow employees know the employee's sentiments toward unionization. The conditions most conducive for these factors are small units, in which all employees and the employer representative are familiar with each other on a daily basis and situations in which delays are encountered in the election process. Delay may give both the employer and fellow employees additional opportunities to break down the resistance of individual employees to revealing their otherwise secret preferences on unionization.

This third hypothesis is consistent with the findings that nonparticipation increases with delay faster in elections in which unions win over those in which employers win. Units are smaller in elections in which unions win than in elections in which unions lose. Thus, the asymmetry in the rate of growth in nonparticipation may not be due to the wins and losses per se, but rather to the size of the units associated with wins and losses.

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[47] In the public sector, a few jurisdictions have focused on nonvoters by requiring a union to win a majority of all members in a specified unit. Preliminary studies have shown that this more stringent requirement has not resulted in a larger number of union losses than would otherwise be expected. *See, e.g.*, Pegnetter, *Majority Voting Requirements in Public-Employee Bargaining Unit Elections*, 33 Proc. Annual Meeting of the Indus. Rel. Res. Ass'n 234 (Denver, Colo., Sept. 5-7, 1980).

[48] Under Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966), the employer is obliged to furnish the Board, for transmittal to the union, the names and addresses of all employees eligible to vote. The list must be furnished within a week of the agreement or the ordering of an election. *See also* National Labor Relations Bd. v. Wyman-Gordon Co., 394 U.S. 759 (1969).

[49] Excess delays might convince some workers to be indifferent. But this does not explain why disinterest might become more prevalent when elections are delayed a few days, as suggested by the results reported in this article.

This third hypothesis also suggests that nonvoting is an indirect consequence of delay, operating through the employee's aversion to risk. Alternatively, delay may affect nonvoting directly by creating uncertainty in the mind of the employee. An employee who is unsure about the benefits and cost of unionization may simply refuse to make a decision and not vote. Under such circumstances, the employer would benefit from nonvoting if the employees who nominally support change, as represented by the collective bargaining of the employment relationship, are also the ones most prone to uncertainty. This hypothesis that delay leads to uncertainty and nonvoting, and that nonvoting is likely to occur disproportionately among nominal union supporters, is consistent with the finding that delay decreases the margin of union victories and, although less so, increases the margin of employer victories.

This analysis, of course, is speculative. More than likely all four explanations, as well as others, are probably operating. Nonetheless, the evidence presented suggests nonvoting can have an impact on the outcome of representation elections. The Board in its decisions may wish to account for the impact of the behavior of the parties on discouraging people from voting. In addition, scholars doing research on NLRB elections should probably follow the trail taken earlier by political scientists, toward a better understanding of voter participation.[50]

VI. Summary and Conclusion

This paper has presented an overview of the characteristics of delay in NLRB representation elections. These data, although not without their limitations, suggest several points. First, delay in representation proceedings appears to be due more to the behavior of the parties than to Board administrative inefficiencies in the processing of cases. Second, delay aids employers in that a longer period of time between petition and election appears to increase the likelihood of the employer winning. Third, the data suggest that "small" increases in case processing time are important. According to the estimate calculated here, a delay of approximately ten days is significant in differentiating employer wins from employer losses.

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[50] *See, e.g.*, Ferejohn & Fiorina, *Closeness Counts Only in Horseshoes and Dancing*, 69 Am. Pol. Sci. Rev. 920 (1975); Ferejohn & Fiorina, *The Paradox of Not Voting: A Decision Theoretic Analysis*, 68 Am. Pol. Sci. Rev. 525 (1974); Riker & Ordeshook, *A Theory of the Calculus of Voting*, 62 Am. Pol. Sci. Rev. 25 (1968). *See also* Aldrich, *Some Problems in Testing Two Rational Models of Participation*, 20 Am. J. of Pol. Sci. 713 (1976) (testing the Riker-Ordeshook and Ferejohn-Fiorina models).

Fourth, size appears to be a concomitant of delay. Cases in larger units take longer to process and are more likely to result in a hearing rather than in a voluntary settlement. The units in which unions win, moreover, are smaller than the units in which employers win. The inference is that unit size may be a proxy for the amount of resources the employer can invest in delay and increase its chances of winning.

Fifth, a small number of votes can have a great influence on the election. On the average, a switch of less than eight votes in all the elections would have changed the outcome. When one accounts for the nonvoters, the elections are even closer. Additionally, the data suggest that elections get closer, and nonparticipation increases, with delay. Although the reasons for this phenomenon are only speculative, they prompt questions on the assertion of employers that delay gives them time to present information to voters. More important, however, the small margins found in typical election yields some insight on how a "short" period of ten days could have such a large impact on election outcomes.

In addition, the findings presented suggest two broader points. First, the results suggest that, while legally important, a preoccupation by the Board, the parties, policymakers, and scholars on the election cases evidencing extreme delays can be misleading. Cases such as *Darlington*,[51] *Ex-Cell-O*,[52] and *J.P. Stevens*[53] have had great consequences for the substantive law. By focusing on these landmark cases, however, attention has been diverted from the trends in the more common representation cases, accounting for the great bulk of the Board's representation case intake. Indeed, quantitative research techniques may possibly contribute to law in this area by identifying characteristics common to the majority of cases.

Second, in approaching the question of procedural delays, the Board has adhered to the adage that "justice delayed is justice denied." In an adjudicatory proceeding, delay, while undesirable, is not thought to have an impact on the outcome of the case. The facts in the case do not change and, in most cases, neither do the statutes under which the litigation is occurring. In other words, procedural delay does not substantially affect the substantive outcome of the case, although the timing of the decisions does constitute some temporary loss of welfare to the moving party. In that sense, "justice delayed" is not actually "justice denied," but merely "justice delayed." Ultimately, each party ideally receives what would have been received absent the delay.

This result, however, may not occur in NLRB representation elections. If delay results in the outcome of the election being different than it might otherwise be, then delay is a far more serious problem in the context of elections than in the context of adjudicatory decisions. If delay results in creating an employer win from what would otherwise be a union win, then the delay has resulted in a change in the substantive outcome of the process. To the extent that this delay is unnecessary or results from a misuse of the Board's processes, then the union may truly find itself in a situation of "election delayed, election denied."

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[51] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

[52] 185 N.L.R.B. 107, *enf'd*, 449 F.2d 1058 (D.C. Cir. 1971).

[53] *See* National Labor Relations Bd. v. J.P. Stevens & Co., 563 F.2d 8 (2d Cir. 1977).

X. CONTRIBUTED PAPERS: RELATIONS BETWEEN INDIVIDUALS AND ORGANIZATIONS

A Preliminary Analysis of the Participation Rate and the Margin of Victory in NLRB Elections

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The rate of voter participation in National Labor Relations Board (NLRB) representation elections has been considered one of the strongest and most successful aspects of the National Labor Relations Act. Typically, about 90 percent of eligible employees vote in NLRB elections,[1] as compared to a participation rate of roughly 50 percent in major political elections. It is not surprising, therefore, that the participation rate in NLRB elections is seen as strong evidence of the acceptability of the process by which representation disputes are resolved. However, in work recently completed, we found that this seemingly satisfactory situation may obscure some disturbing characteristics of the participation rate. Our evidence suggests that variations in the participation rate across NLRB elections may not be random, and possibly linked to the outcome of some elections.[2]

The purpose of this paper is to explore in a preliminary fashion the

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[1] These and other data on NLRB elections have been taken from magnetic tapes containing the agency's administrative records for fiscal years 1973–1978.

[2] Myron Roomkin and Richard N. Block, "Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence," *University of Illinois Law Review,* 1981, No. 1, pp. 75–99.

role of voter participation in NLRB elections. The next section presents a brief statement of the standard theory of voter participation as it may apply to participation in NLRB elections. Following this, some potential explanations for nonparticipation in NLRB elections will be discussed. Next, preliminary tests of one of the explanatory hypotheses are presented. The concluding section summarizes results and discusses their implications for national policy.

Voter Participation

The basic models of voter participation all appear to be based on the work of Anthony Downs.[3] Using a utility maximizing framework, Downs hypothesized that a person would vote in an election when the benefits of voting exceeded the costs. According to Downs, the benefits of voting to an individual are a function of (1) the party differential, i.e., the difference in utility to the individual if one party wins as compared to the other party's winning; (2) the effect of the individual's vote on the outcome of the election, i.e., the extent to which the individual's vote will make a difference; and (3) the utility to the individual from participating in the democratic process. The primary cost of voting is time—in this case the time it takes to obtain information about the opposing parties and the time it takes to vote.

In view of this, it is not surprising that voter participation in NLRB representation elections is high. To begin with, workers have strongly held views on the question of unionization, which should motivate people to participate in the decision-making process. Second, the difference in the bundle of economic and noneconomic terms and conditions of employment with and without collective bargaining might be sufficiently large such that all workers are likely to perceive a positive differential between the union's winning and the employer's winning. Third, any individual employee's vote is important. Elsewhere, we found that, for the period July 1972 through September 1978, a change of 7.8 votes would have changed the outcome of the average single-union election.[4] In addition, a marginal voter might still be influenced to participate in the election by a strong sense of obligation to his employer, fellow workers, and the election process itself.[5]

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[3] Anthony Downs, *An Economic Theory of Democracy* (New York: Harper, 1957), pp. 36–50, 260–76. For some other work in this area, see, for example, William H. Riker and Peter Ordeshook, "A Theory of the Calculus of Voting," *American Political Science Review* 62 (March 1968), pp. 25–42, and John A. Ferejohn and Morris P. Fiorina, "The Paradox of Not Voting: A Decision Theoretic Analysis," *American Political Science Review* 68 (June 1974), pp. 525–36.

[4] Roomkin and Block. This was the average for all (45,115) single-union, nondecertification representation cases closed between July 1972 and September 1978.

[5] See Downs, Riker and Ordeshook, and Ferejohn and Fiorina.

Apart from the benefits, the costs of voting are minimal. Voting occurs at the workplace; thus, no time need be allocated to it that is not already allocated to work. Moreover, the costs of acquiring information are minimized, since NLRB and court decisions have given the parties the right to campaign at the workplace.[6]

Although these forces work to encourage voter participation, our earlier study found that voter participation in NLRB elections tended to decline the longer it took to conduct the election. Furthermore, this decline was asymmetrical between union wins and employer wins, the decline being less pronounced in the latter case. More important, however, NLRB representation elections tend to be close enough, and are decided by a sufficiently small number of voters, that the number of nonvoters could make a difference in the outcome. For example, during the period July 1972 through September 1978, on the average, 89.9 percent of all eligible voters voted in NLRB single-union, nondecertification elections. The average election unit size during this time period was 56.1 employees. This means, then, that in the average election, roughly 5.6 employees did not vote. As noted, a change of only 7.8 votes would have altered the outcome of the average election.[7] Variations around these means strongly suggest that nonparticipation affected the outcome of many elections. For example, assuming that all nonvoters would vote against the winner, union victories would be reversed into losses in elections occurring after three to four months.[8]

Voter Participation in NLRB Elections: Some Hypotheses

Why might employees, in spite of the obvious importance of the outcome of the election, choose to refrain from voting?[9] Four nonmutually exclusive reasons should be considered. First, turnover during the campaign might result in some new employees being unaware of the costs and benefits of collectivizing the employment relationship with their (new) employer. Second, some employees might be truly disinterested. We believe that nonvoting for these two reasons is likely to be minimal and, more important, unlikely to be altered by Board policy.[10]

Other causes of nonparticipation seem more crucial. Delay might cause uncertainty in the minds of the voters. This may be a result of the parties' campaign. Because the union is associated with change, and change implies risk, it was thought that the employer would stand to benefit from nonvoting that occurred for this reason. It would be expected that the uncertainty would be concentrated disproportionately among nominal union supporters. Generally, the results discussed earlier suggest that this factor is operating.

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[6] See, for example, *Livingston Shirt Corp.*, 107 NLRB 400 (1953), *General Knit of California*, 239 NLRB 619 (1978), and *Republic Aviation* v. *NLRB*, 324 U.S. 793 (1945). Unions may have access to the employer's premises only if there are no other reasonable means to reach the employees. See *NLRB* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956).

[7] Roomkin and Block.

[8] Roomkin and Block.

[9] We exclude from our analysis nonvoting due to normal absenteeism.

[10] Roomkin and Block.

Also, some employees may be risk averse, fearful of the enmity of one party should they be identified with the other. Thus, an employee who supports the union might be concerned that, if the union loses, the employer will take some retaliatory action against him or her. Similarly, a pro-employer employee may have similar fears about retaliation from his fellow employees and/or the union if the union wins.

Still, it is reasonable to believe that these employees are interested in the outcome of the election. Such nonvoters could constitute free-riders,[11] who abstain from voting only if they believe their vote will not alter the outcome of the election and if by voting they may bear a cost. In Downs's terms the costs of voting in terms of risk of retaliation are sufficiently great so as to offset the small benefits from voting in an election which is not perceived to be close. Thus, even a nominal union (employer) supporter will not vote if he or she believes that the employer (union) will win without the additional vote. Analogously, a union (employer) supporter who believes the union (employer) will win without the extra vote will also abstain. The benefits of voting in this latter case are also low, as are the risks of retaliation, compared with the previous case. However, the costs or risks are nonzero, since even in the presence (absence) of a union, the employee may still perceive that he or she can be harassed by the employer (fellow employees). In general, if prior to the election an employee is known to be a supporter of the (ultimately) losing side, that employee, by not voting, can at least claim that he or she did not participate in the decision.

There are two assumptions underlying the free-rider hypothesis: (1) the individual employee-voter can accurately "handicap" the outcome of the election, and (2) other employees and the employer know the preelection preferences of the employee-voter. These strike us as reasonable assumptions. The average election unit is small (56.1 employees between July 1972 and September 1978). Considering the intensity of many election campaigns, the length of the average campaign (approximately two months after a petition is filed), and the amount of employee interaction that is likely to occur in small units, it is reasonable to believe that these assumptions will hold. Although an employee's actual vote is secret, other employees and the employer will perceive an employee who votes as voting in accordance with his or her (known) preelection preference.

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[11] See Robert Abrams, *Foundations of Political Analysis* (New York: Columbia University Press, 1980), for a discussion of free-riders in political elections.

A Preliminary Test of the Hypothesis

If "risk-aversion" does motivate nonvoters' behavior, participation should be lower in elections which represent the largest risk or in which the margin of victory is greater. As a preliminary and very rough test of the validity of this hypothesis, the zero-order correlation was computed between the following variables:

$$\textit{Percentage voting} = T_i/E_i \times 100$$

where T_i denotes the total number of votes for both the employer and the union in election i and E_i denotes the total number of employees eligible to vote in election i; and

$$\textit{Margin of victory} = (V_i^w - V_i^m)/T_i$$

where V_i^w denotes the total votes for the winning party in election i, V_i^m denotes the minimum number of votes necessary for the losing party to have won election i, and T_i is as defined above.

Table 1 presents these zero-order correlations using data for approximately 45,000 single-union, nondecertification representation cases closed between July 1972 and September 1978. Separate coefficients were computed for union and employer victories and for units of varying size. Seventeen of the 21 calculated coefficients are negative at levels of statistical significance above the .10 level, suggesting that as the margin of victory in the election increases, the percentage of employees voting declines. This is what would be expected if nonvoters were risk averse, handicapped the outcome of the election, perceived that their preferences were known, and deduced that their vote would not make a difference.

The results also indicate that the negative relationship is stronger in elections in which unions win as compared with elections in which employers win. Although we can only speculate on the reasons for this, it may be that when the employer wins, the union is not present at the worksite to take actions against the employees who voted against it. When the union wins, however, the employer is still present.

Finally, the relationship appears strongest in larger units, i.e., units with more than 50 employees. It may be that employees perceive that larger employers are more likely than smaller employers to be able to retaliate even in the presence of a union. This could be consistent with results from our previous study which suggested that larger employers have a greater capacity than do smaller employers to resist unionization.

TABLE 1

Zero-Order Correlation Coefficients Between Percentage of Eligible Voters Voting and Margin of Victory for all National Labor Relations Board Single-Union, Nondecertification Elections, July 1972–September 1978

	Employer and Union Victories	Employer Victories	Union Victories
All Sizes	−.08***	−.10***	−.08***
n	(45085)	(24094)	(20991)
1–50 EES	−.09***	−.10***	−.096***
n	(33618)	(16664)	(16964)
51–100 EES	−.18***	−.11***	−.24***
n	(5707)	(3431)	(2276)
101–200 EES	−.128***	−.076**	−.314***
n	(3980)	(2661)	(1319)
251–500 EES	−.114***	−.063*	−.313***
n	(1245)	(933)	(312)
501–1000 EES	−.042	.035	−.342***
n	(401)	(401)	(100)
GT 1000 EES	−.02	−.057	−.341*
n	(134)	(114)	(20)

*Significant at .10 level
**Significant at .05 level
***Significant at .01 level or less

Because the total number of voters appears in the numerator of one variable and the denominator of the other, a negative bias is introduced. Using a 10 percent random sample of the data (in an effort to reduce the costs of computer runs), zero-order correlations were calculated between the log of the margin of victory and percentage voting. Another specification substituted for the margin of victory variable a variable that used in the denominator the number of votes cast in favor of the winner. Both sets of correlation coefficients by size and winner were almost identical in magnitude to those in Table 1.

There may be additional tests that one could run given the risk aversion hypothesis and the richness of available data on representation elections. One option would be to aggregate turnout and outcome indicators across elections by some sorting variable (say, city or region) and year of the election. Election turnout could be correlated with lagged values of the outcome for the sorting variable, thus dealing with the potential negative bias introduced in the variables used above. As we design these tests, however, we are mindful that the theory of risk averse behavior is predicated on the insights of individual employees and the role the campaign plays in helping workers identify the preferences of fellow employees. Consequently, any test relying on aggregated data would also have its limitations.

Summary and Conclusions

As suggested by the literature of political science, nonparticipation in NLRB elections is not a random occurrence, but one related to the closeness of the election. Also, previous results indicate that nonparticipation is related to the amount of time it takes to conduct an election after a petition is filed. Both sets of results indicate that nonvoting takes on a more systematic pattern in union wins than in union losses.

If employees are not participating in union elections because of fear of retaliation from the loser, and if the nonparticipation influences the outcome of elections, then it might be necessary to reevaluate existing rules governing the campaign and the election to see how they actually encourage or discourage participation. Obviously, no agency can require all employees to vote, nor should they interfere with a worker's right to abstain. Rather, it may be time to improve our understanding of the election process by improving our knowledge of those who do not vote.

Senator KENNEDY. Let me ask you, Professor Roomkin, how much of the change in terms of the time is statutory, and how much of that is regulation?

Professor ROOMKIN. In terms of how much delay can one obtain?

Senator KENNEDY. Yes.

Professor ROOMKIN. Well, we found on average that the required or voluntary procedures, where one of the parties contests or refuses to go for a stipulated election, those sorts of things added about one month. But the really important point here, as you can see when you look at the study, sir, is that the basic distributions with respect to delay of union wins and union losses are virtually identical; that most of these things are done within two months, and it is only at the tails do we begin to see excess and perhaps dilatory delay.

I guess if I am saying anything today, it is that this is not a problem at the extreme. This is a fundamental characteristic of the process. The representation election is not analogous to a political election, where voters can opt in and opt out without consequence. The employment relationship is inherently one in which people cannot express their views without fear of ultimate reprisal. There is inherent coercion.

Senator KENNEDY. Dr. Cooke?

Dr. COOKE. My name is Bill Cooke, and I am an Associate Professor of Industrial Relations at the University of Michigan.

In addition to teaching M.B.A.s and Ph.D. students, our future managers in this country, about labor-management relations, I am also faculty director of two executive education programs in which I teach current managers about labor-management relations. I am also co-director of the Joint Labor-Management Relations Center, a new institution at the University of Michigan.

I make those comments not as a form of self-congratulations or self-condolence, but to make it very clear that I do not think one can cast my research in the light that somehow I am anti-management or somehow pro-union.

Over the last ten years, I have engaged in several research projects on issues that are pertinent to this Committee, and I would like to share some of my findings with you. Many of you have seen the statement that I have written.

There is an outstanding and rather disturbing fact that about 25 to 30 percent of the time, after unions have been certified as the exclusive representatives of various work units, they do not obtain first contracts. They fail to reach an agreement with the employer. And again, as Myron has asked, why, why would this be the case?

I would say that what I am going to lead up to certainly fits the testimony that you have already heard.

I find that there are three key factors that largely explain the inability of work units to obtain agreements once they have a union certified as their representative. They include the delays associated with filing objections to campaign conduct; 8(a)(5) refusal or failure to negotiate in good faith; and probably most importantly, 8(a)(3) discrimination, the kind of discrimination that you heard testimony to today.

Let me highlight a few key points about each one of these and share with you some results of a variety of statistical tests based on survey research and data collected from the National Labor Relations Board.

Let me begin with campaign objections. In my testimony, I have compiled several tables. One deals with objections. What you will see there is that there was a threefold increase over the period 1965 to 1985 in the incidence of objections filed. Since 1981, however, that figure has dropped, and there are probably reasons for that. But it rose from approximately 6 percent of the time in 1965 to over 15 percent of the time in 1981.

In my own sample of first contract negotiations in Indiana, beginning in 1981-82 and going through 1983, 19 percent of the firms objected to the campaign conduct of the union.

The median delay in resolving those—and in every case, they were resolved in favor of the union—the median delay was over 210 days. That means half the time it takes longer and half the time it takes less time.

Based on a form of regression analysis, which basically means controlling for other variables, the independent impact of this typical delay (tied only to objections) is to reduce the likelihood that a union will obtain a contract by about 25 percentage points, which can be interpreted to mean more than 25 percent of the time; again simply by the delay tied to objections.

The second factor is the 8(a)(5) refusal to bargain or failure to bargain in good faith. Without getting into any detail as to what the expectations are regarding good faith bargaining, there are basically two forms here, after the union has been certified, or has at least won the certification election.

First, an employer can refuse to bargain on technical grounds. Simply stated, it seems what most employers are trying to do (albeit many cases are legitimate) is to gain further delays they can use the technical refusal to bargain because the objection procedure does not allow the employer or the union to have a circuit court review of the NLRB decision. So it is a technical refusal, and in that technical refusal, the employer simply says, "We refuse to bargain until we have had our objection heard by a circuit court of appeals."

So you can add to the regular objection a re-routing of this objection through an unfair labor practice charge of the refusal to bargain.

In my sample, 13 percent of the time employers were found to fail or refuse to bargain in good faith. The median delay on these, which would be added to the 210 days I just noted, is approximately 350 days. And that does not include taking it to a circuit court of appeals. That is getting it through the five-member Board in Washington, DC.

In the statistical analysis I made, I did not account for the delay that was tied to refusal to bargain. Instead I simply included meritorious charges as decided by the NLRB; a meritorious charge that the employer refused to bargain in good faith. That variable had the independent effect of reducing the likelihood of getting the contract by roughly 25 percentage points.

The third factor that I would like to address (and that you have already heard testimony on) deals with 8(a)(3) violations. Largely, these include discharges or discriminatory layoffs. I have provided a table with regard to the trends in 8(a) charges and the trends in back pay awards.

Between 1950 and 1981, there was a sixfold increase in the number of 8(a)(3) charges. Between 1950 and 1981, there was an elevenfold increase in back pay awards, i.e., the NLRB found that the charges brought were meritorious. When you read the NLRB decisionmaking with regard to 8(a)(3), you need to bear in mind that they are searching for motive and evidence of motive. That is not in many cases easily obtained in an administrative law judge hearing. A very sophisticated employer need not show that motive.

Now, after 1981 through 1983, based on figures that I was able to obtain from NLRB annual reports, (which are missing for 1982 because of some sort of technical problem) there was a reported decline in 8(a)(3) charges.

However, I would like to point out something about this decline. When you look at 8(a)(3) discrimination, most of that surrounds some sort of union organizing activity; sometimes well before an election (but someone is trying to organize a bargaining unit), during the election campaign and subsequent to the election (what I call the first contract negotiation period).

What I attempted to do was to take these figures from the NLRB annual reports and put a couple ratios together so we could get a feel for whether this trend is upward or downward.

Here is what I find using NLRB statistics. Between 1965 and 1983, if you take the ratio of 8(a)(3) reinstatement cases to the number of elections plus first contract negotiations in that year, the ratio rose from 9 percent of the time to 50 percent of the time.

If you take the ratio of back pay award cases——

Senator KENNEDY. Excuse me. What does the 9 to 50 percent represent, again?

Professor COOKE. The 9 percent ratio would mean 9 percent of the time there was a reinstatement case for all elections and first contract negotiations; and that is the figure for 1965.

Senator KENNEDY. And now it is 50 percent?

Professor COOKE. Now it is 50 percent—in fiscal 1983. We will not have any later figures until the NLRB provides them.

Senator KENNEDY. What conclusion do you draw? Just from that figure, you can say that the NLRB is much more aggressive and much more protective of workers. I mean, you may draw that conclusion. Is that what you are drawing, or something else? Or, you could draw the conclusion that there are a lot more people who are being fired, and therefore more people are being reinstated because there is a good deal more abuse. I think we have got to get that nailed down.

Professor COOKE. Okay. To address that—and maybe we will have to go a little bit further—but to address that, looking at the figures here, you will find that the meritorious rating is roughly the same over this entire period. So I do not think it is a matter of the NLRB becoming more liberal in deciding that the charges are meritorious. So that is pretty constant over this period of time.

What is not constant, is the dramatic drop in the number of union elections after 1981, is a dramatic increase in the number of back pay awards. So what it strikes me as, is simply a greater willingness of employers to discharge or in some other way discriminate against these employees, who are either union activists or union supporters.

My proposition is that by discharging the union activist or the union supporter, typically the key activists, you do two things. First, you get the key union organizers off the facility, and second of all, as I think you have heard testimony here, you send a very chilling message to on the rest of the work unit; saying in effect, that if I do not want you here, I will make sure you are not here, and I may pay some small penalty called a back pay award, but I am willing to do that.

That is what I would say is going on.

Senator Kennedy. What is the average back pay award?

Professor Cooke. I do not have that figure with me. What is calculated is back pay with mitigation. That is if the individual worked after he or she was discharged, that is subtracted from that back pay award.

Senator Kennedy. I was wondering what the general awards were.

Professor Cooke. We could figure that out. I do not have that in front of me.

Senator Kennedy. Could you do that?

Professor Cooke. I would be happy to.

Senator Kennedy. I would like to see what those flow lines are.

Professor Cooke. Okay.

The Chairman. Please continue.

Professor Cooke. When I look at the other ratios, the back pay cases to elections and first contracts, I find this to be the most outstanding ratio figure. In 1965 that ratio was 11 percent of the time; today it is 120 percent of the time, basically meaning that there is a meritorious charge 1.2 times for every election and for every first contract negotiation that went on in 1983.

When I examined the independent impact of discriminatory discharge in my statistical analysis, I find the impact of a meritorious 8(a)(3) complaint to reduce the likelihood of getting a first contract by 44 percentage points, which basically means you cut in half the likelihood of obtaining a first contract. And that is controlling for other unfair labor practices and controlling for a number of other, I think, important factors that one would have to bear in mind when it comes to negotiating first contracts.

In my sample, 8(a)(3) violations that were meritorious occurred 17 percent of the time. These are 8(a)(3) violations after the union won the election and during the period of the first contract negotiations.

In another study, I looked at the impact of 8(a)(3) discrimination on the likelihood that the union would win an election, again controlling for a host of other factors. I infer from the statistics that the impact of a meritorious 8(a)(3) discrimination charge is to reduce the likelihood of winning the election by over 20 percentage points. That fits rather consistently with what you have heard already today.

Because I have probably taken more time than I should have, let me close by stating, as Myron has, that although statistical tests rarely prove any cause-effect relationship, and the statistical estimates presented herein are only rough approximations of impact, all the evidence nevertheless, I think, points to a highly reasonable and inescapable conclusion: 8(a)(3) discrimination, 8(a)(5) refusal to bargain in good faith, and the long, long delays tied to resolution of these unfair labor practices and the resolution of objections to elections, have quite a negative impact on organizing outcomes.

I have not been asked to make recommendations regarding what we ought to do, although I do have some ideas which are in a book that I wrote a couple of years ago. It is clear that two things have to occur. We have to reduce these unnecessarily long delays, and there has to be some way, some strong disincentive to keep employers from resorting to 8(a)(3) discrimination and refusing to bargain in good faith to keep unions out. That is what I would appeal to your Committee to attempt to accomplish over the months and years to come.

[The prepared statement of Professor Cooke follows:]

TESTIMONY OF PROFESSOR WILLIAM N. COOKE BEFORE
THE SUBCOMMITTEE ON LABOR
OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
FEBRUARY 5, 1988*

My name is Bill Cooke. I am an Associate Professor of Industrial Relations in the School of Business Administration at The University of Michigan, Ann Arbor. In addition to teaching labor-management relations to M.B.A. and Ph.D. students in our regular degree programs, I am Faculty Director of two programs in labor-management relations in our Executive Education Division of the School. I am also co-director of the Joint Labor-Management Relations Center of the Institute of Labor & Industrial Relations, University of Michigan.

Over the last ten years I have conducted several research projects on issues pertinent to these hearings. In this statement I will discuss the interface between NLRB regulation of labor-management relationships and union organizing activities. Others have discussed this interface and certification election outcomes; I will primarily focus on union efforts to obtain first contracts subsequent to winning certification elections.

On this topic, a rather outstanding and disturbing fact is that, based upon my independent investigations, unions are unable to parlay election victories into first contracts 25 to 30 percent of the time. My results indicate three reasons for this failure rate, all pertaining to employer action. Employers can:

(1) illegally discriminate against union activists (8(a)(3) violations);
(2) refuse to bargain in good faith as intended by the NLRA (8(a)(5) violations); and
(3) intentionally utilize the lengthy delays associated with NLRB procedures in an effort to undermine lasting support for union representation, such as when filing campaign conduct objections.

In this statement I will first highlight the legal and related procedural parameters of these activities. Second, I will briefly report on my statistical analysis of the impact of these key factors on the likelihood that unions obtain first contracts (detailed discussion can be found in several published reports listed in the Reference section). In conclusion, I will draw from these statistics as well as others' testimony to underscore that unless the time typically required by the NLRB to resolve disputes is greatly reduced, and, concomitantly, these unlawful activities are halted, the problem we address here today will worsen.

Review of Key Violative Activity

8(a)(3) Violations: The most common 8(a)(3) unfair labor practice (ULP) charge is when employers simply discharge employees for union activity. Other charges include selective layoff, selective transfers to other departments or facilities, and selective demotions to less desirable jobs. It is worth noting that in a large proportion of these charges, plaintiffs also charge that employers engage in coercive treatment (illegal surveillance, interrogation, threats of reprisal, and/or promises of benefits).

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* This statement was prepared with substantial assistance from Lynn P. Cooke. Her timely input is gratefully acknowledged.

Employer defenses to 8(a)(3) charges fall into two broad categories. First, employers argue that complainants were in fact dismissed or demoted because of inadequate performance, instances of insubordination, or poor work records (e.g., excessive absenteeism). Second, employers frequently attribute layoffs or discharges to economic necessity or incentives, which required a reduction in the work force, transference of work, or sale of part of the business.

In deciding the merits of 8(a)(3) complaints, the NLRB determines the employer's motive in the treatment of an employee. In ascertaining motive, several criteria are weighed. Did the employer directly coerce the complainant(s)? The NLRB generally finds that such direct coercion indicates union animus, and a desire to discriminate against the complainant(s). In those cases where coercion occurred but was not directed toward the complainant(s), the NLRB weighs the extent of the illegal activity. In cases where employers claim poor work performance, the NLRB reviews both the employer's stated policy and past practice. Finally, in cases where employers claim economic necessity, the NLRB reviews such factors as increase or decrease in sales, or whether replacements were hired.

Extent of 8(a)(3) Violations: As reported in Table 1, there was a six-fold increase in the number of 8(a)(3) charges made annually between 1950 and 1980 (from 3,213 to 18,315). That number dropped significantly after 1980 to 11,754 in 1983. Later figures have yet to be provided in NLRB reports. There was a dramatic eleven-fold increase in the annual number of employees awarded back pay between 1950 and 1981 (from 2,259 to 25,631). As with the number of charges, the number of back pay awards also dropped in 1983, to 17,888. It is important to underscore, however, that 8(a)(3) violations are largely tied to union organizing and first contract negotiations. Thus, while the actual **number** of charges and back pay awards is declining, the **rate** is increasing dramatically.

To illustrate this trend, Table 2 reports both:

(1) a. the ratio of the annual number of 8(a)(3) cases in which employees are reinstated or placed on preferential hiring lists, to
    b. the annual number of certification elections and first-contract negotiations; and

(2) a. the ratio of the annual number of 8(a)(3) cases in which employees received back pay, to
    b. the annual number of certification elections and first contract negotiations.

The estimates reveal a disturbing increase in the proportion of union-organizing efforts accompanied by one or more discriminatory discharges. Based on cases of reinstatement or preferential hiring arrangements, the ratio has risen from roughly 9 percent in 1965 to nearly 50 percent in 1983. Based on cases involving back pay awards, the ratio climbed from approximately 11 percent in 1965 to 121 percent in 1983! In other words, employers are found guilty of violating 8(a)(3) about 1.2 times for every election and every first contract negotiation. Although we cannot interpret these ratios literally, as an index these figures point that 8(a)(3)-related discrimination now far surpasses what occurred only ten years ago.

Objections and Challenges to Elections: The NLRB is responsible for resolving objections and challenges to the certification elections. These entail possible misconduct by either party during election campaigns and disputes over who had the right to vote in elections. NLRB regional offices are responsible for investigating objections and challenges. If the facts of a case are in question, a hearing before a hearing officer is scheduled. In those cases in which the NLRB finds the facts of objectionable conduct to be true, the regional office then must decide whether or not the conduct would have had a significant impact on the election. Here, NLRB policy requires the regional director infer whether or not the conduct would change the minds of voters to such a degree that the election outcome would have been different than if the objectionable conduct had not occurred. If not, the election results stand. If so, the regional director recommends setting aside the election and ordering a rerun election. However, the five-member Board makes the final decision regarding the setting-aside of elections except in those handful of certification elections in which the parties consent to giving the Regional Director final authority.

The procedure does not provide quick or direct enforcement or review. For an employer to obtain court review of a Board order, or for a union to enforce the certification and bargaining order, the following steps must be taken: After winning an election, the union asks the employer to begin negotiations. The employer refuses, typically via letter. The union then files an 8(a)(5) ULP charge (failure to bargain in good faith) with the regional office. The regional office requests a summary judgment from the Board in order to bypass the usual administrative law judge hearing. In the summary judgment, the Board summarizes its earlier review of the case, and then generally orders the employer to bargain in good faith. An employer's continued refusal to bargain forces the NLRB to seek enforcement in a circuit court of appeals. Alternatively, an employer may appeal the Board's decision to a circuit court of appeals. This procedure allows employers to postpone any first contract negotiations for many months, if not years. Statistics are not readily available for calculating the typical time delay associated with this objection procedure. However, based on my sample data reported below, the median delay of the election objection procedures is about 210 days; add another 350 days for resolution of refusal to bargain charges (short of court review).

Extent of Objections and Challenges: Table 3 reports the extent to which employers have filed objections over the last twenty years. As reported, there was a nearly three-fold increase in the proportion of elections won by unions and followed by employer objections from 1965 to 1981. That proportion dropped substantially after 1981, and more recent figures are not yet publicly available.

8(a)(5) Violations: In addition to technical refusals to bargain, sophisticated recalcitrant employers may go through all the necessary motions of good faith bargaining, yet their intention is not to reach agreement. Such "surface bargaining" is clearly violative of Section 8(a)(5), but is difficult for the Board to remedy. The Board must look at the totality of the employer's behavior. Were compromises or counterproposals made to union proposals? Did the employer have reasonable explanations as to why union proposals were unacceptable? Did the employer only agree to minor provisions without movement on any substantive issues? The Board also looks at whether the employer provided pertinent information to the union, treated union leadership disparagingly, dealt directly with employees, postponed meetings, or proposed compensation levels and work rules no better or different than from the first proposal.

In addition to the long delays associated with NLRB procedures for resolution (again about 350 days in my sample), the remedy imposed on the employer is merely an order to bargain in good faith.

Statistical Analysis

In this section, I will summarize the pertinent findings of my research. Elaboration on the various models, statistical techniques, and data bases used can be found in the original reports (see References). In a nutshell, the key objectives behind these research projects were to (1) "explain" why unions fail to obtain first contracts, and (2) estimate the impact of Section 8(a)(3) discrimination on certification election outcomes. In these studies I attempted to statistically control for a wide range of factors in order to estimate the independent impact of discrimination, objection delays, and refusals to bargain in good faith on first contract negotiation outcomes and certification election outcomes. In my studies, I utilize data from a sample of elections and first-contract negotiations occuring in Indiana (Region 25) and a sample of first contract negotiations nationwide. In both samples, unions were surveyed in 1983 regarding negotiation outcomes of 1979 or 1980 elections. In the Indiana sample, 23 percent of the sample failed to obtain a contract; in the nationwide sample, 28 percent failed to obtain a contract.

In the Indiana sample, data concerning objections and challenges to elections, 8(a)(3), and 8(a)(5) ULP charges were obtained from Regional Office 25 in Indianapolis. In the national survey, union leaders were asked whether any ULP charges were filed, the nature of these charges, and NLRB decisions. These responses, however, were not verified against NLRB records.

Impact of Objections and Challenges Delays: It was first hypothesized that the greater the delay between the date of the election victory and the date on which all objections and challenges are resolved (and the employer is ordered to bargain), the greater the opportunities for the employer to chip away at worker cohesiveness and union resources. To test this hypothesis, I measured the number of days between the election date and the date on which the NLRB regional office closed the certification election. This closing date, however, marks only the end of the period during which any objections and challenges to the election were resolved--if necessary, by the Board. It does not reflect additional delays associated with ULP complaints of discrimination or refusal to bargain. In the Indiana sample, 19 percent of the employers filed objections and challenges to elections. The median delay in resolving these matters was about 210 days. In the logit regression equation, the statistically significant estimates indicate that, on average, every one-month delay between the election date and the NLRB closing date for objections and challenges to election outcomes reduced the probability of obtaining an agreement by as much as four percentage points. Given the median time required to resolve objections, this means that the probability of successfully negotiating first contracts is about 27 percentage points lower when employers file objections and challenges than would be otherwise (everything else the same).

Impact of 8(a)(5) Violations: Next it was hypothesized that by refusing to bargain in good faith, the employer effectively communicates to the workers the futility of their efforts to obtain a contract. Union leaders and workers know (or soon become aware) that it will take at least a year before a court acts on such a case, and even then the court will take no remedial action other than to order the recalcitrant employer back to the bargaining table. Consequently, unless the workers are willing to strike and are thereby able to force the employer to bargain in good faith, the employer's refusal to bargain can be expected to quickly and severely demoralize the work unit, forcing the union to abandon its efforts to obtain a contract. To estimate the impact of the refusal to bargain upon negotiation outcomes, I included only meritorious 8(a)(5) charges. Whenever a complaint was deemed meritorious by the regional office, and resulted in a hearing before an administrative law judge or was settled prior to a hearing, I treated the charge as meritorious. A charge was considered timely for the purposes of this study if it was filed subsequent to but within one year of the election victory, or before a contract was signed.

Results: Thirteen percent of employers in the Indiana sample were found to violate Section 8(a)(5) as measured. My statistical estimates indicate that on average the refusal to bargain reduces the probability of obtaining a contract by as many as 25 percentage points over those cases in which employers apparently negotiate in good faith.

Impact of 8(a)(3) Violations: There is a growing literature contending that discriminatory discharges of union activists and union supporters are relatively inexpensive means by which employers can keep unions out of the work place. It appears that such discrimination removes key organizers and also has a chilling effect upon other workers in the unit, who fear further employer reprisals for union activity. Although the NLRA supposedly protects employees from such discrimination, the NLRB seems able neither to block employers from discharging union activists nor to reinstate those discharged in a timely manner. It was hypothesized, therefore, that discriminatory discharges and other forms of illegal discrimination increase the workers' cost of pursuing union representation, which decreases the likelihood of a union victory and/or that a first contract will be obtained. In my statistical tests, I measured meritorious charges of 8(a)(3) discrimination utilizing the same criteria as presented above for 8(a)(5) violations.

Results of First Contract Negotiation Study: Employers hoping to chill employee demand for a union contract by discharging or otherwise discriminating against union activists appear to be overwhelmingly successful. My estimates indicate that the incidence of one or more 8(a)(3) violations deemed meritorious by Region 25 reduced the probability of reaching an agreement by some 44 percentage points. Furthermore, the incidence of such activity was not limited to a mere handful of employers: in 17 percent of this sample, the union filed a meritorious ULP charge of discriminatory behavior against the employer.

Although I will not elaborate herein, my nationwide study yielded similar statistical results: 8(a)(3) and/or 8(a)(5) ULP violations reduced the likelihood of obtaining first contracts by approximately 35 percentage points.

Results of Election Outcome Study: As discussed above, I have also examined the impact of 8(a)(3) violations on certification election outomes. Utilizing the Indiana sample, I analyzed observations on union losses in elections, obtaining strong statistical support for the hypothesis that 8(a)(3) discrimination greatly reduces the likelihood that unions win certification elections. First, it is inferred from the statistical estimates that, overall, 8(a)(3) discrimination reduces the probability of a union victory by roughly 20 percentage points. More detailed analysis also showed that discrimination prior to the election petition date has a strong independent effect on union success at the polls, reducing the likelihood of victory by as much as 23 percentage points. It was also found that 8(a)(3) charges not deemed meritorious by Region 25 were strongly associated with union losses. Apparently, employees are intimidated by employer actions that appear discriminatory, albeit the NLRB did not find discriminatory motive.

Concluding Remarks

Although statistical tests rarely prove any cause-effect relationship, and the statistical estimates presented herein are only rough approximations of impact, all the evidence nevertheless points to a highly reasonable and, I think, inescapable conclusion: 8(a)(3) discrimination, 8(a)(5) refusals to bargain in good faith, and the long, long delays in resolving objections and challenges to election conduct, all have a deleterious impact on workers attempting to secure effective union representation.

Furthermore, the evidence is clear that 8(a)(3) discrimination, unabated by the current law, has been on an unprecedented rise, and the time currently required to filter campaign objections and ULP charges through the NLRB undermines any principle of swift and effective justice. Hence, if we are to provide employees a reasonably unfettered choice to select or reject union representation, Congress must refashion the law and/or NLRB policies and procedures, eliminating employer incentives to discriminate and refuse to bargain in good faith, and providing much speedier campaign conduct dispute resolutions.

As I have not been asked for recommendations that might accomplish these goals, I will forego making any in this testimony. Most of my recommendation can be found, however, in Cooke, 1985b, Chapter 4, and in Cooke, 1985c.

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Cooke, William N. (1985c), "The Rising Toll of Discrimination Against Union Activists," Industrial Relations, Vol. 24, No. 3.

TABLE 1

8(A)(3) DISCRIMINATION CHARGES AND REMEDIAL ACTION, 1950–1983

Year	8(a)(3) Charges[a]	Reinstatement cases[b]	Preferential hiring cases[c]	Back pay cases	Employees offered reinstatement	Employees accepting reinstatement	Employees on preferential hiring lists	Employees receiving back pay
1950	3,213	NA	108	NA	2,111	NA	NA	2,259
1955	3,089	NA	45	NA	721	NA	NA	1,171
1960	6,044	NA	90	NA	1,885	NA	NA	3,110
1965	7,367	1,122	152	1,467	5,875	5,081	644	4,477
1970	9,290	952	110	1,658	3,779	2,723	628	6,679
1975	13,426	1,532	91	2,249	3,816	2,608	408	6,948
1980	18,315	2,851	998	3,984	10,033	8,952	3,915	15,566
1981	17,571	2,322	750	3,776	6,463	5,025	3,373	25,631
1982	14,732	NA	NA	NA	NA	NA	NA	NA
1983	11,754	1,312	137	6,263	6,029	5,091	769	17,888

Sources: *Annual Report of the National Labor Relations Board*, selected years, generally Tables 2 and 4

[a] The figures presented include any ULP charge in which an 8(a)(3) violation was charged even if other ULP charges were filed simultaneously.

[b] Number of cases in which reinstatement was *offered*.

[c] Number of cases in which complainants were placed on preferential hiring lists but not necessarily rehired.

TABLE 2

Trends in 8(a)(3) Violations

Year	No. of elections	Per cent won by unions	Reinstatement cases[a]/ elections + 1st contract negot.[b]	Back pay cases/ elections + 1st contract negot.
1965	7,176	60.8	8.8	11.4
1970	7,426	52.6	7.6	13.2
1975	7,729	49.6	11.9	17.5
1980	7,296	47.9	23.8	33.2
1981	6,656	45.4	20.8	35.1
1982	4,247	43.7	NA	NA
1983	3,483	47.7	49.8	121.3

Source: ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD, selected years.

[a] Cases in which one or more employees were reinstated or placed on preferential hiring lists.

[b] Total certification elections plus number of elections won by unions (i.e., first contract negotiations).

TABLE 3

EMPLOYER OBJECTIONS TO CERTIFICATION ELECTIONS WON BY UNIONS, 1965-1983

Year	Won elections	Employer objections	Ratio of objections to elections
1965	4,608	261	5.7
1970	4,367	368	8.4
1975	4,001	471	11.8
1980	3,498	503	14.4
1981	3,019	455	15.1
1982	1,857	242	13.0
1983	1,663	135	8.1

Source: ANNUAL REPORT OF NLRB, selected years, tables 11A and 11C.

Senator **Kennedy**. Let me ask you, did you make any assessment about the delays? Are the delays longer now than they were earlier? Do you find that that is a trend as well?

Professor **Cooke**. I cannot figure that out with the figures I have available. I think you would have to go in with a sample and follow that sample. However, there may be a way—Myron—with the NLRB annual reports that that could be deciphered.

Professor **Roomkin**. Yes. It is a published statistic. Unfortunately, the agency is four to five years behind in publishing its annual reports. All of us are working off the latest report for fiscal year 1983-84 data, sir. Some say it is an artifact of the budget problem.

Professor **Cooke**. On the other hand, the NLRB is very receptive to inquiries, since they have the data on magnetic tape; it simply has not been put in report form. So if we were to request this kind of information, I am sure we can count on them to provide it.

Professor **Roomkin**. Yes. They have been very cooperative.

Professor **Cooke**. Oh, yes. You could not ask for a better group there—that is, the statistical branch within the NLRB.

[Laughter.]

Senator **Kennedy**. Professor Roomkin, before I get started with some questions, may I ask for the record if you are being compensated for the testimony you have given today.

Professor **Roomkin**. No, I am not, sir.

Senator **Kennedy**. Either by a labor group, a management group, or anybody else?

Professor **Roomkin**. No.

Senator **Kennedy**. And the research that forms the basis for your testimony, did any management or labor group pay you for that?

Professor **Roomkin**. No, they did not.

Senator **Kennedy**. Do I correctly understand your testimony to say that the delay between the filing of a petition and the representation election biases the result against the union even where there are no employer practices that are illegal under the NLRA?

Professor **Roomkin**. That is the inference, sir, yes.

Senator **Kennedy**. And could you give us a brief explanation for why we find routine delays hurting the union prospects more than the employers' changes in an election?

Professor **Roomkin**. As I said, I believe it has to do with the swing voters, who are few in number. The sensible employer will try to "handicap" the election—by identifying those who are supporting the company, those who are for the union, and those who have not made up their mind. The employer puts his efforts in trying to influence those people who are on the margin.

As my research indicated, those are primarily a handful of people, and the longer it takes to conduct this election, the more time the employer has to identify these swing voters, and the more time it has to influence them. The way swing voters resolve this dissidence is that they abstain from voting.

Senator **Kennedy**. Professor Cooke, for the record let me ask is anyone paying you for your testimony this morning?

Professor **Cooke**. No.

Senator **Kennedy**. And did any labor or management group pay for the research that forms the basis of your testimony?

Professor COOKE. An independent research foundation called the Upjohn Institute for Employment Research funded most of this.

Senator KENNEDY. Is it fair to conclude from your research and testimony that unfair labor practices may pay off for employers trying to prevent unionization, even where the Board eventually finds that the practices were unfair and grants a remedy?

Professor COOKE. Yes. I find that an inescapable conclusion, frankly.

Senator KENNEDY. So in many instances, the employees are not getting the free and uncoerced choice about whether to unionize that the NLRA is supposed to guarantee, are they?

Professor COOKE. I think the figures support that and are very consistent with the testimony. And I am in full agreement with that conclusion.

Senator KENNEDY. Another scholar who has studied the problems you talk about has concluded that delay is the Achilles heel in the approach to the regulation under the NLRA. Would you care to comment?

Professor COOKE. I think that is one of them. I think it is the delay, and I think it is the inability to block employers from discriminatory discharges and related forms of discrimination, which just have such a chilling impact on that bargaining unit.

So I think we have got to find a way to block it, and I think we have to find procedures for quick resolution.

Senator KENNEDY. Would you express an opinion about what you think the current Board and the increased commitment of management to union avoidance play in the outcomes that you have found? Do these factors contribute to the underlying problem and make it worse?

Professor COOKE. Well, Senator Kennedy, I certainly would come to the conclusion that the evidence is fairly overwhelming that there is some increased commitment by employers to avoid unions. I do not know that that is the majority of employers by any means, but all the trends indicate an increased commitment to union avoidance.

With regard to the current Board, it would be very difficult for me to conclude that they have exacerbated the problems. They certainly haven't done anything, on the other hand to remedy the problems. But I think when you go back through all the Boards, you'll see that the problems of delay have been around for some time. Certainly, delay has been exacerbated in recent years. A lot of it appears to be due to the appointment process and the turnover within the current Board.

So I think it would be difficult to say this Board has made it more difficult for workers to organize. They certainly, given their image, have sent a very clear signal to employers that they can be more active in the area of union avoidance, and the Board will be more sympathetic. That would be my impression.

Senator KENNEDY. All right. That is very helpful.

We will include all the statements in the record, and we will be back to you to try and get some of the suggestions you might have in terms of how to deal with this. I think that would be useful and important, and we want to get those on the record so we are able to evaluate and people will be able to react to those suggestions. So we will be getting back to you.

I want to thank you very, very much. It is an extraordinary indictment of the current system and process. One cannot reach any other conclusion but that to try and organize today, the deck is really stacked against the workers in trying to carry forward their legitimate interests.

And I think what is even more tragic is the general public feeling is that there is a democratic system that is in place, although from the testimony we have heard today, that just is not so. I think that is part of the real dilemma, because people have some perception that at least it is a fair process. And clearly, the overwhelming testimony today is that it is not.

We will be addressing these issues as we move on through the system, and hopefully, next year. We are very grateful to all of our witnesses this morning. All of their statements will be printed in their entirety in the record.

[Material supplied for the record by Mr. Reeves follows:]

Senator KENNEDY. The Committee stands in recess.

[Whereupon, at 11:55 a.m., the Committee was adjourned.]

JD(ATL)--3--88
Atlanta, GA

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

THE ALL AMERICAN GOURMET

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 579, AFL-CIO

Cases 10-CA-22144-1
10-CA-22144-3
10-CA-22144-5
10-CA-22305

THE ALL AMERICAN GOURMET COMPANY
Employer

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 579 AFL-CIO

Case 10-RC-13308

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 579, AFL-CIO
Petitioner

Victor Alan McLemore, Esq.,
for the General Counsel and the
Regional Director for Region 10.
Richard R. Boisseau & David P. Phippen, Esqs.,
(Kilpatrick & Cody), Atlanta, GA,
for the Employer and the Respondent.
Robert Sarason, Esq., &
Linda Riggins, International Field Representative,
for the Petitioner and Charging Party.

DECISION

Statement of the Case

HOWARD I. GROSSMAN, Administrative Law Judge: The petition in Case 10-RC-13308 was filed on 7 April 1986 by Service Employees International Union, Local 579, AFL-CIO (herein Petitioner, Charging Party, or the Union.) Pursuant to a Stipulation for Certification Upon Consent Election Agreement, an election by secret ballot was conducted on 23 May 1986 among the employees in the appropriate unit to determine the question concerning representation.[1] Upon conclusion of the balloting, the parties were furnished a tally of ballots which shows that of approximately 371 eligible voters, 201 cast valid votes for the Petitioner, 131 cast valid votes against the Petitioner, and 12 cast challenged ballots. The challenged ballots are insufficient in number to affect the results of the election.

On 2 June 1986, The All American Gourmet Company (herein the Employer or Respondent) filed timely objections to the election and a copy thereof was served on the Petitioner. After an investigation of the issues raised by the objections, the Regional Director for Region 10, on 1 July 1986, found that the objections raised no material or substantial issues affecting the results of the election. On 16 July 1986, the Employer timely filed exceptions to the Regional Director's Report on Objections. On 5 March 1986, the Board found that substantial and material issues of fact and law had been raised regarding the conduct described in the Employer's Objections 1-6, and 8 which could best be resolved at a hearing.

The original charges in Cases 10-CA-22144-1, 10-CA-22144-3, and 10-CA-22144-5 were filed on 10 November 1986 by the Union, the original charge in Case 10-CA-22305 on 11 February 1987, and the original charge in Case 10-CA-22339 on 24 February 1987. After previous issuance of a consolidated complaint, an amended consolidated complaint issued on 27 March 1987. As further amended at the hearing, it alleged that the Respondent threatened its employees engaged in distribution of Union literature in nonwork areas during nonwork time, and prohibited its employees from discussing terms and conditions of employment with anyone but Respondent, in violation of Section 8(a)(1) of the National Labor Relations Act (herein the Act). The complaint further alleged that the Respondent discharged employees Ricky Reeves and Mike Collier because of their activities on behalf of the Union and because they engaged in concerted activities with other employees for mutual aid and protection, in violation of Section 8(a)(3) and (1) of the Act. Finally, the complaint alleged that the Respondent unilaterally changed its disability pay policy without consulting the Union, refused to bargain with the Union over its denial of a wage increase to employees, and unilaterally laid off various employees without consulting the Union - all in violation of Section 8(a)(5) and (1) of the Act.

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[1] The stipulated appropriate unit in the representation case was: "All production and maintenance employees employed by the Employer at its Atlanta, Georgia facility, including all maintenance mechanics, maintenance crew leaders, tool crib attendants, tool crib leaders, sanitation aides, sanitation crew leaders, food preparers, food preparer-leaders, cooks, cook leaders, material handlers, material handler leaders, production assemblers, machine operators, line attendants, q.c. inspectors and line leaders, but excluding all other employees, temporary employees, office clerical employees, guards and supervisors as defined in the Act." In the unfair labor practice proceeding, the pleadings as amended at the hearing add the Employer's street address, so that the stipulated unit is "All production and maintenance employees employed by the Employer Respondent at its 5475 Bucknell Drive facility in Atlanta, Georgia" etc.

On the same date as the complaint, 27 March 1987, pursuant to the Board's aforesaid Order in Case 10-RC-13308, the Regional Director for Region 10 issued orders consolidating the representation and unfair labor practice cases for hearing.

A hearing was held before me on the aforesaid matters on 12, 13, 14, and 15 May 1987, in Atlanta, Georgia. Thereafter, the General Counsel, Petitioner/Charging Party, and Employer/Respondent filed briefs. Subsequently, the Employer/Respondent submitted a letter objecting to certain statements in the General Counsel's brief. Upon the entire record, and upon my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

The Employer/Respondent is a Delaware corporation with an office and place of business located at Atlanta, Georgia, where it is engaged in the production and distribution of food items. During the calendar year preceding issuance of the amended consolidated complaint, a representative period, the Employer/Respondent sold and shipped from its Atlanta, Georgia facility, food products valued in excess of $50,000 directly to customers located outside the State of Georgia. The Employer/Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The pleadings establish and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Objections to the Election

A. Summary of the Objections

The Employer's objections are basically that Union agents engaged in unlawful electioneering in and around the polling area, that the Union circulated campaign materials containing forged signatures, that completed ballots were improperly exposed to employees, and that the Union agents in general acted improperly and interfered with the process of the election.[2]

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[2] The Employer's Brief in Support of Exceptions to the Regional Director's Report on Objections, RD Exh. 1(i), pp. 2-3. As condensed in the Employer's brief, Objections 1, 2, 3, 4, and 6 are as follows:
(Continued)

A threshhold questioned raised by the Employer is whether individuals who assertedly engaged in such conduct were Union agents, so that their conduct is attributable to the Union. The Employer bases it argument that such attribution can be made on its contention that certain of the individuals who allegedly engaged in objectionable conduct were members of an In-House Organizing Committee (IHOC), and that some were also Union observers at the election.

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[2] 1. . . . one of Petitioner's organizers engaged in impermissible electioneering, campaigning, and conversation with prospective voters who were in line waiting to cast ballots, to vote for Petitioner. He also entered the polling area to survey the situation there and spoke to one of the Petitioner's observers in the polling area while several prospective voters looked on . . .

2. . . . two of Petitioner's observers communicated and conversed with each other, with prospective voters and with representatives of Petitioner in the polling area itself . . .

3. . . . one of Petitioner's observers who was assigned to release voters repeatedly engaged in improper electioneering and campaigning and encouraged numerous prospective voters to vote for the Petitioner as they left their work stations to vote . . .

4. . . . several employees, including one of Petitioner's organizers, openly displayed to numerous prospective voters in the polling area election ballots marked with an 'X' in the 'yes' box. Further, one employee in the polling area boisterously called the attention of prospective voters to his ballot and created a significant disturbance. Also, one of Petitioner's organizers voted in the morning polling period, but returned to the polling area in the afternoon and had to be ordered to leave the area by the National Labor Relations Board agent in the presence of numerous prospective voters as they prepared to cast ballots . . .

* * *

6. Petitioner, through its representatives and supporters, circulated a piece of campaign literature containing a number of employee signatures indicating that the listed employees had signed the document, were voting 'yes', and had authorized Petitioner to use their names on the document. In fact, numerous employees whose signatures appeared on the document had not signed the document or authorized the use of their names, and their signatures on the document constitute forgeries. Many of the listed signatures were names of former employees . . . (id., pp. 3-4)'.

Objections 5 and 8 are conclusory allegations that Petitioner by said conduct, considered individually and cumulatively, interfered with employees' rights to freely select a bargaining representative (RD Exh. 1(f).

B. The Organizational Campaign, the Establishment of the IHOC and its Functions

The chief organizer of the campaign was Linda Riggins, International Field Representative. She was assisted by other Union officials - Orah Bilmes, another International Field Representative; Robert Sarason, Regional Coordinator; and Nancy Lenk. Riggins held meetings, passed out authorization cards, and did leafletting in front of the plant.

Riggins testified that the IHOC consisted of "any workers who attended meetings, passed out leaflets, and got other employees to sign union authorization cards." Its employee members distributed leaflets, including some to the Employer, solicited employees to sign authorization cards and petitions, obtained employee addresses and telephone numbers, participated in union skits at meetings, and, "with a Union rep," visited employees at their homes. Riggins testified that IHOC members did not call meetings or make major campaign decisions. Some of them signed the tally of ballots after the election.

Riggins and another union official prepared a document with the words "Organizing Committee" at the botton. It contains 25 signatures. The document states that the signatories are on the "Organizing Committee" and that they had authorized the Union to use their names to show their support for the Union. The document contains various arguments favoring the Union. It also contains a "reminder" of a forthcoming union meeting.[3] The Union distributed copies of this document to employees at a Union meeting.

The Employer submitted union documents distributed subsequent to the election, not to prove improper electioneering, but to establish that the IHOC was the Union's agent. One document states that "SEIU Local 579 and the Organizing Committee" are fighting for guaranteed wages, and another document links the two together. Several documents with IHOC's name announce forthcoming union meetings. One with the Union's name shows several raised fists, said by the Employer to be a Union symbol. The Union and the "Committee for a Fair Contract," otherwise unidentified, are shown to have the same telephone number.[4]

C. Alleged Objectionable Conduct during the Election

1. Summary of the Evidence

(a) Arrangements for the Election

There were two voting sessions, one in the morning and one in the afternoon. Employer official Rick Shannon testified that the parties were concerned that noise in the plant might prevent employees from hearing an announcement on the public address system that it was time to vote. Accordingly, the parties agreed that the "releasing" observers would carry a sign saying "Time to Vote."

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[3] Employer's Exh. 1.
[4] Emp. Exh. 13.

There is conflicting evidence on the number of signs carried by the releasing observers. The Company had the same observers for both voting sessions, and Anthony Chapman was the Company's releasing observer. Chapman asserted that there were two signs, and that he carried one of them.

The Union had different observers for the two sessions. The Union's releasing observers for the morning and afternoon sessions, Precious Jones and Frances Young, testified that there was only one sign, and that they, the Union observers, carried the sign. Young said that it was "possible" that the Company observer carried a sign. Company official Shannon testified on cross-examination that there was only one "Time-to-Vote" sign.

There is further conflicting evidence on whether the releasing observers were authorized to say anything to the voters. Company observer Chapman contended that, if the voters did not see the sign, the observers were authorized to say the work, "Attention." Company official Shannon contended that various words were "bantered about," and that the Board agent finally agreed on the word, "Attention." Union observer Precious Jones denied that the observers were allowed to say anything. Union observer Frances Young affirmed that he said nothing while releasing voters and, so far as he knew, no one else did so.

The Board's written instructions, given to the observers, admonish them not to help any voter, electioneer, or "argue" during the election.[5]

(b) Alleged Objectionable Conduct of Union Observer Precious Jones (Objection 3)

Precious Jones was a Union observer during the morning session and signed the tally of ballots. What purports to be her signature appears on the "Organizing Committee" document. There is no other evidence of union activities by Jones, except Riggins' general testimony about the activities of IHOC members.

Company observer Chapman testified that he had been actively opposed to the Union's campaign since it started. Chapman and Jones together released voters during the morning session. According to Chapman, he and Jones were releasing voters in the "Blancher area," about 30 feet from the voting area. Chapman could not recall whether he and Jones shouted "Attention." The sound would have carried into the voting area. Chapman testified that employeee Grady Langford asked Jones, "How's it going?" Jones nodded affirmatively. Chapman then turned to show his sign to voters, and, when he turned back, Jones "was flashing hand signals . . . to give a count of how the election was going." Asked to describe what Jones did, Chapman fully extended his right hand and fingers, partially extended his left hand, shook his right hand, and pointed at himself with his index finger. As indicated, Chapman contended that he and Jones each had a sign.

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[5] P. Exh. 11.

Jones denied that Langford asked her how it was going or said anything else to her. She denied that she gave any signals or "flashed" her hands. Langford did not testify.

Jones, as indicated, affirmed that there was only one "Time-to-Vote" sign. It was a large sign, and she held it with both hands. Jones further declared that she did not try to keep track of how the vote was going. The voters placed their ballots in the ballot box, and she does not "have X-ray vision." She acknowledged that the "cooks" had voted "by 6:14," but denied that she knew the cooks were strongly for the Union. Consistent with her testimony about general instructions, Jones denied that she and Chapman said "Attention" - they weren't "allowed to say any words."

Chapman also asserted that, when he and Jones were releasing voters in another area, she raised her hand with the "Fist of Unity." Chapman identified this as a sign used by most Union supporters. As indicated above, some of the Union documents show this sign. Jones was asked whether she was familiar with the "salute" of raising a clenched fist, and said that it means "Right On." She denied that she ever gave this sign during the election - "that's not me," she said.

Chapman further contended that, when he and Jones were releasing voters at the shipping dock, employee Conrad Wells gave the "Fist of Unity," and Jones "returned it." Wells then asked Chapman whether he was also for the Union. Jones shook her head, and touched Chapman's Company observer badge. Other employees were present that could have seen this. Jones denied that Wells spoke to her before he reached the voting area. He was talking when he entered the voting area, and Jones put her finger to her lips and said "Sssh." Wells did not testify.

(c) Alleged Objectionable Conduct of Union Observer Natasha Kelly (Objection 2)

Natasha Kelly, together with Precious Jones, was one of the Union's observers during the morning session and signed the tally of ballots.[6] What purports to be Kelly's signature appears on the "Organizing Committee" document. There is no other evidence of union activities by Kelly, except Riggins' general testimony about the activities of IHOC members.

Company observer Chapman asserted that, on seven occasions, he saw Kelly talking to employees waiting in line to vote. On cross-examination,

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[6] The third union observer during the morning session was Rosemary Graham.

Chapman admitted that it was the employees who initiated the asserted conversations, and that, although he could not hear what Kelly said, she was "moving her lips." These conversations lasted a few seconds. Although Chapman did not bring these matters to the attention of the Board agent, the latter on "several occasions" told Kelly not to talk. Although not asserted by Chapman, Precious Jones testified that the observers did not talk to one another.

Kelly acknowledged that the Board agent's instructions were that the observers were not to talk to voters. She denied that any voters attempted to talk to her or that she spoke to them. Kelly further denied that she was reprimanded by a Board agent. The Regional Director's representative signed a certificate that the voting had been fairly conducted.[7]

(d) Alleged Objectionable Conduct of Employee Steven Hill (Objection 1)

What purports to be Steven Hill's signature appears on the Organizing Committee document. According to Company observer Chapman, he knew Hill to be a union supporter because, in the breakroom, Hill told employees what the Union could do for them. Company observer Lasanja Williams also identified Hill as a union supporter.

Company observer Chapman contended that Hill, after voting during the morning session, came into the "waiting area" during "second shift voting time" and said, "Right on, y-all are going to vote my way, aren't you?" The curtain to the voting area then opened, and Chapman assertedly saw Hill talking to employees waiting in line to vote. A few minutes later, Hill came into the voting area, and whispered to an observer Chapman believed to be Natasha Kelly. After the luncheon recess at the hearing, Chapman changed his testimony and said that the observer was not Natasha Kelly.

After a review of the identities of the Union's afternoon observers, Chapman denied that it was either Ricky Reeves or Frances Young to whom Hill spoke. Chapman therefore concluded that it "had to have been Deborah (Wright)."

Another Company observer, Lasanja Williams, gave a different version of this asserted incident.[8] She heard Hill talking through the curtain, but did not hear what he said. Hill then put his head through the curtain a few times, and came in. He spoke to a Union observer whom Williams identified as Precious Jones. A Board agent asked Hill to leave and he did so, but Williams could hear him talking outside the voting area. There is no mention of this incident in an affidavit which Williams submitted to the Employer on 9 June 1986.[9]

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[7] P. Exh. 9.

[8] The third Company observer was Kim Shaw.

[9] P. Exh. 8.

Precious Jones and Natasha Kelly were Union observers only during the morning session. Both denied talking to voters during that session. The Union observers for the afternoon session were Frances Young, Ricky Reeves, and Deborah Wright. Young and Reeves said that they knew Hill, but denied seeing him during that session. Wright testified that Hill "peeped" through the curtain from the outside. When he did so, Company observer Chapman "jumped up" to report the matter to the Board agent. However, before anything further occurred, Hill left. Wright did not hear Hill say "Right on, you're going to vote my way, aren't you?" or anything else.

(e) Alleged Objectionable Conduct of Employee Barabara Saratt (Objection 4)

What purports to be employee Barbara Saratt's signature appears on the Organizing Committee document. There is no other evidence of her union activities except Riggins' general testimony about the function of IHOC members.

Saratt voted during the morning session. Company observer Lasanja Williams asserted that Saratt placed her ballot inside the ballot box, but that Williams could see that she had voted "Yes." Other employees were present, but Williams did not know whether any of them saw this. On cross-examination, Williams agreed that Saratt's ballot was "slightly" folded. Williams contended that she never heard the Board agent give instructions to fold ballots before placing them in the ballot box. Williams further asserted that either Company observer Anthony Chapman or Kim Shaw told her that he had seen Saratt's marked ballot. Chapman did not corroborate this testimony, and Shaw did not testify.

Saratt's testimony about her voting is unclear. After repeated questions and examination of a diagram of the voting area, she appears to have told Petitioner's counsel that she marked her ballot in an enclosed voting area, but folded it just prior to placing it in the ballot box. However, on recross-examination by the Employer's counsel, Saratt testified that she folded her ballot at the place marked on the diagram as the enclosed place for voting, and then placed it in the ballot box. In any event, Saratt denied showing her ballot to anybody. The three Union observers during the morning session - Jones, Kelly, and Graham - denied seeing Saratt openly display her ballot.

(f) Alleged Objectionable Conduct of Employee Linwood Barber (Objection 4)

What purports to be Linwood Barber's signature appears on the Organizing Committee document. There is no other evidence of his Union activity, except Riggins' general testimony about the functions of IHOC members.

Company observer Chapman testified that Barber, after having voted in the morning session, returned to the voting area and was told by a Board agent to leave.

Barber testified that he was assisting an employee who had been out for three weeks because of an injury. At about 2:00 p.m., he showed this employee to the voting area up to but not through "double doors" leading to the voting area. Barber denied that any Board agent asked him to leave. Ricky Reeves, a Union observer during the afternoon session, denied seeing Barber.

(g) Alleged Objectionable Conduct of Employee Ivan Jeter (Objection 4)

Employee Ivan Jeter worked on the first shift. Company observer Chapman testified that Jeter, after voting, placed his ballot in the ballot box, pulled it back up, and said, "I've got to check and see if I done voted right." According to Chapman, Jeter then opened his ballot and held it up showing a mark in the "Yes" box, so that other prospective voters could have seen it. Chapman agreed that he himself had already voted.

Jeter testified that he voted in the voting booth, folded the ballot inside the booth, and then placed it in the ballot box. He denied pulling it back out after placing it in the box. Jeter also testified that he did not say anything "out of the ordinary." Asked to clarify this on cross-examination, Jeter stated that he did not say anything except to give his name when asked. Union observer Precious Jones affirmed that she knew Jeter, and denied that she saw him openly display his ballot with an "X" marked in the "Yes" box. Union observer Natasha Kelly denied that she heard any employee say, "I've got to make sure I done voted right." Kelly also denied seeing any employee openly display his ballot, or pull his ballot out of the ballot box after placing it inside.

2. Factual Analysis

(a) Precious Jones

I credit Jones' uncontradicted and partially corroborated testimony that she was carrying a long "Time-to-Vote" sign with both hands.[10] In these circumstances it would have been physically impossible for Jones to have extended both arms in a signal to employee Grady Langford, as Chapman contended. Further, I note the inherently reasonable nature of Jones' testimony that she had no way of knowing how the voting was proceeding. In addition, Jones appeared to be a more truthful witness than Chapman. For these reasons, plus the fact that the Employer did not call Langford as a witness, I reject Chapman's testimony and credit Jones' denial that she engaged in the alleged conduct.

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[10] The testimony of Jones and Young, corroborated by Employer official Shannon, tends to establish that there was only one sign, and that Chapman's assertion that there were two signs should be rejected. However, it is not necessary to establish the number of signs, since the evidence clearly shows that Jones was carrying one.

For essentially the same reasons I reject Chapman's testimony that Jones raised the "First of Unity" while releasing voters, either independently or in response to such a sign from employee Conrad Wells. Although it would have been easier to raise one arm rather than two, the fact that Jones required both hands to hold the sign is a factor suggesting that Chapman's testimony is erroneous. Jones' testimony about "the fist" --"it's not me" -- was an apparently truthful description of her own reaction to the Union "salute."

Although Jones did not specifically deny that Wells asked Chapman any questions, such denial is implicit in her testimony, including the description of Wells' talking in the voting area.[11]

For these reasons I conclude that Jones did not engage in any of the conduct alleged by Chapman.[12]

(b) Natasha Kelly

I do not credit Company observer Chapman's testimony that Union observer Kelly spoke to voters on any occasion, much less 7 occasions, or that the Board agent on several occasions asked Kelly not to talk. I base this finding in part on Kelly's denial, since she appeared to be a more truthful witness than Chapman. I note also that Chapman did not bother to protest this matter to the Board agent, and that the latter signed a certificate that the election had been fairly conducted.

(c) Steven Hill

The Employer's witnesses supplied inherently contradictory testimony on whether Hill could be heard outside the voting area saying anything, much less asking voters to vote "his way." Although Hill supposedly said this before coming into the voting area, according to Chapman, Williams could not hear what he said. Williams did not mention the asserted incident in a pretrial affidavit. Further, Deborah Wright, who was a more truthful witness than either Chapman or Williams, testified that she did not hear Hill say anything.

The Company's evidence that Hill came in during the afternoon session and spoke to a Union observer is even more contradictory. Company observer Williams selected Precious Jones as the Union observer. However, this would have been impossible, since Jones was not present during the afternoon session. Chapman's first choice - Natasha Kelly - was also a morning observer not present in the afternoon. Chapman's final conclusion that it "had to have been" Deborah Wright was reached by a logical process rather than direct knowledge, which does not inspire confidence.

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[11] Assuming arguendo that Wells did ask Chapman whether he was also for the Union, Jones' asserted gesture of touching Chapman's Company observer badge did not, as the Company argues, tend to demean Chapman. Rather, it would have been a simple nonverbal gesture identifying Chapman's status in the election procedure. In any event, I note that the Company did not call Wells as a witness, and find that Jones did not engage in this conduct.

[12] I find it unnecessary to determine whether the observers were authorized to say the word "Attention" to voters. Chapman could not remember, and Jones denied it.

Crediting Wright, I conclude that Union supporter Steven Hill, after having voted during the morning session, put his head through the curtain during the afternoon session, and then left when Company observer Chapman "jumped up" to protest. There is no credible evidence that Hill said anything.

(d) Barbara Saratt

I do not credit Company observer Williams' testimony that Saratt displayed a "Yes" vote on her ballot, because (a) Saratt's testimony, although confusing, finally settles on the voting booth as the place she folded her ballot, after Saratt examined a diagram of the voting area; (b) the three union observers denied that Saratt displayed her ballot; and (c) Williams admitted that Saratt's ballot was "slightly" folded. Although Williams asserted that Company observer Chapman or Shaw also told her about the visibility of Saratt's ballot marking, neither of them corroborated her - Chapman was a witness.

(e) Linwood Barber

Barber was a more truthful witness than Chapman, and I credit his testimony that he helped an employee reach the voting area but did not enter it. I rely also on the fact that Barber's testimony was corroborated by another witness, and the fact that the Board agent signed a certificate that the election had been fairly conducted.

(f) Ivan Jeter

The consistent testimony of Jeter and Union observers Kelly and Jones has greater probative weight than Chapman's uncorroborated assertions. I note also the difficulty if not impossiblity of retrieving a ballot once it has been fully placed through the slot into the ballot box - as Jeter did, according to Chapman. Relying also upon the Board agent's certificate and the absence of any evidence that this asserted incident was protested during the election, I conclude that Jeter did not engage in the conduct attributed to him by Chapman.

D. The Alleged Forgeries (Objection 6)

1. Summary of the Evidence

(a) The Union's Election Day Campaign Leaflet

On election day the Union distributed a large leaflet with purported signatures of over 200 employees on the front and reverse sides. The front side had a diagram and printing at the top, including an authorization to use the signatories' names on a leaflet.[13]

This leaflet was a compilation of numerous other documents characterized as "petitions" by one Union witness. According to Union official Riggins, the Union started with a petition containing 17 original signatures and the legend at the top described above. Copies of this document were made, and were used to obtain additional signatures on other petitions. These in turn were copied and the process repeated. The petitions are in evidence. The numbers of names on them vary, but they all begin with the same names.[14] Although Riggins did not personally observe the solicitation of all the signatures, she testified that, to her knowledge, all signatures were genuine, and none was secured without the legend at the top. She told Union supporters obtaining signatures to make sure that the employee read the top of the petition.

Some of the petitions contain an irregular line which, with some gaps, extends across the petition between the legend and the first names. Although this line is lighter on some petition and darker on others, it has the same contour on all petitions, and just touches the top of the first letter of the first name of the signatory in the right hand column.[15] Other petitions do not have this line. Riggins testified that this line on occasion was made by the Union's photocopy machine, for unknown reasons. On other occasions the machine did not make the line. Union employee Nancy Lenk, who actually produced the leaflet, was unaware of these lines.

Lenk did the "layout" for the leaflet. She testified that she made copies of the various petitions, cut up the copies, and pasted signatures onto two larger pieces of paper. This document is in evidence, and shows the pasting of various signatures onto the larger two pages.[16]

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[13] The top of the front page of the leaflet contained the statement, "We Are Voting Yes." This was followed by a diagram across the page consisting of raised fists. Thereafter the following statements appeared:

> We Are Voting Yes for Three Simple Reasons:
> 1) Dignity and Respect
> 2) Job Security-Eliminate the Point System
> 3) Money
>
> We authorize the Union to use our names on a leaflet since we want the All-American Gourmet Workers to know that we are voting Yes for SEIU Local 579. We want the All-American Gourmet Workers to stick together! (E. Exh. 2)

[14] Emp. Exhs. 3-12; P. Exh. 13(a-y).

[15] Deborah Wright

[16] P. Exh. 12.

Prior to pasting them on, Lenk checked the Excelsior list to make sure that all names appearing on the leaflet appeared on that list. Lenk then created the leaflet by photocopying the two pages of the layout on the front and back of one large sheet of paper.[17] Employer official Shannon testified that six of the names on the leaflet were those of individuals who were no longer employed at the time of the election, and were thus ineligible to vote.

(b) The Employer's Evidence in Support of the Alleged Forgeries

(1) Todd Pierce

Pierce testified that a signature appearing to be his on the leaflet was actually his signature.[18] He also agreed that a signature purporting to be his, which appeared on a petition, was his signature. This petition contains the irregular line described above.[19] Although Pierce stated that both signatures were his, he contended that he only signed the leaflet, and professed not knowing how his signature came to appear on the petition.

(2) George A. Fordham

What seems to be George A. Fordham's signature appears in the second column on the reverse side of the leaflet. On direct examination, Fordham denied that this was his signature, although he agreed that, while in a hospital, he did sign a document for Union official Sarason.

On cross-examination, Fordham could not remember the date that Sarason came to visit him in the hospital. He was then on medication, and was concerned about being fired. He agreed that Sarason told him that the Union wanted to see how many people supported the Union, and contended that he signed a blank piece of paper for Sarason. He was shown a petition on which his purported signature appears together with 17 other signatures. Fordam's name appears at the botton of the right hand column, underneath four other names. The above described irregular line appears on this document.[20]

Fordham admitted that the signature on the petition was his, but denied that he signed the document. Instead, Fordham maintained, he signed a blank piece of white paper about eight by eleven inches in size. Although this paper was folded when Sarason took it out of his pocket, the Union official completely unfolded it; Fordham held it in his hand and examined it. Fordham said that he placed his own signature on this document somewhat down from the top. There were no other signatures on the document.

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[17] Lenk used a larger copying machine in another office for this purpose.

[18] Pierce's name, minus the last three letters of his last name, appears near the bottom of the last column on the reverse page of E. Exh. 2.

[19] P. Exh. 1.

[20] P. Exh. 2.

Fordham was then asked to sign his name on a blank piece of paper at the hearing and did so.[21] I conclude that what appear to be Fordham's signatures as they appear on the leaflet, the petition, and the slip of paper signed by Fordham at the hearing, were all signed by the same individual.[22] Fordham stated he did not support the Union.

(3) Carmen E. Head

Head's apparent signature appears on the reverse side of the leaflet. Head denied seeing the leaflet before the hearing, and denied that she signed it. She did sign a petition for a "blue authorization card" allowing the Union to "come in," and, a few months after the election, a petition for maternity leave.

Head was shown a petition bearing numerous signatures, with Head's name appearing in the first column. This document has no irregular line below the legend at the top.[23] On cross-examination, Head agreed that this was her signature. On redirect examination, she denied that she signed this document or any document with raised fists authorizing the Union to use her name in a leaflet. On further examination, she affirmed that the signatures on both the leaflet and the petition were hers. Head was asked to sign a blank piece of paper at the hearing, and did so.[24] I conclude that the signatures purporting to be those of Head appearing on the leaflet, the petition, and the blank piece of paper actually signed by Head at the hearing, are all signed by the same individual.[25]

(4) Marlon V. Baskin[26]

What seems to be Baskin's signature appears in the second column on the reverse side of the leaflet. Baskin denied that he signed this document, but affirmed that it was possible that he had signed another document. Baskin was shown a petition,[27] and acknowledged that what purports to be his signature on this document "looked" like his signature. There is no irregular line on this document. Baskin was asked to sign his name on a blank piece of paper at the hearing.[28] I conclude that what appears to be Baskin's signatures on the leaflet, the petition, and the blank piece of paper actually signed by him at the hearing, are all signed by the same individual.[29]

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[21] P. Exh. 3.

[22] Federal Rules of Evidence, Rule 901(b)(3).

[23] The document was originally identified as Petitioner's Exh. 5, but the parties agreed that it was the same document as Employer's Exh. 6.

[24] P. Exh. 4.

[25] Supra, fn. 22.

[26] At the hearing, Baskin spelled his last name "Bskin." However, when he signed his name, Baskin inserted an "a" as the second letter. I conclude that this is the correct spelling.

[27] E. Exh. 12.

(5) Dollie Tigner

What appears to be Dollie Tigner's signature appears on the reverse side of the leaflet, between the second and third columns. On direct examination, Tigner testified that it looked like her signature, but that she did not sign the document. On cross-examination, Tigner was shown a petition with her apparent signature in the right hand column. There is no irregular line below the legend on this document.[30]

Tigner acknowledged that the signature on the petition "looked" like her signature, but denied that it was. She was asked to sign her name on a blank piece of paper at the hearing, and complied.[31] I conclude that the signatures on the leaflet, the petition, and the blank piece of paper actually signed by Tigner at the hearing, were all signed by the same individual.[32]

Tigner agreed that she signed a piece of paper "to get somebody to talk . . . about the Union." Employees Deborah Wright and Frances Young gave it to her. Wright testified about this subject, and identified Tigner's purported signature on the petition as Tigner's actual signature, which Wright obtained.

Tigner agreed that her brother, Freddy Whatley, was a supervisor, that he was opposed to the Union, that she talked to Whatley when she first saw the leaflet, and that he advised her to talk to the Company about it.

2. Factual Analysis

(a) Petitions Bearing the Irregular Line

The Employer argues that the irregular line between the legend at the top of the petition and the names below it suggests that the heading was added after signatures were secured. "Amazingly, the lines always conveniently go exactly between the heading and the signatures, actually winding (their) way around the signature, as if the heading were already on the paper." The Employer also relies on Riggins' inability to produce a photocopy with this line at the hearing, and Lenk's lack of knowledge of the asserted defect in the photocopy machine.[33]

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[28] P. Exh. 6.
[29] Supra, fn. 22.
[30] E. Exh. 6.
[31] P. Exh. 7.
[32] Supra, fn. 22.

The line appears on the petition bearing Fordham's name. However, it does not appear immediately above his name, but, rather, above the topmost names on the petition. Any such documentary alteration, as suggested by the Employer, could not have affected the names below the allegedly "added" heading of the petition. Fordham admitted that the signature was his, but denied that he signed that document. Instead, Fordham asserted, he signed a blank piece of paper without any signatures. This is unlikely, since other signatures appear above Fordham's but below the asserted place of documentary alteration. Accordingly, the document probably had other signatures on it when Fordham signed it. An inference that Fordham signed the petition with the heading is buttressed by his admission that Sarason completely unfolded the document, and that Fordham examined it. Further, it is unlikely that Fordham would have signed a blank piece of paper given to him by a Union official. Finally, Fordham's actual signature at the hearing is the same as that appearing on the petition. Fordham admittedly did not support the Union, and may have been a biased witness.

For these reasons, I find that the evidence is insufficient to establish that Fordham's purported signature on the petition is not his actual signature, and it is obvious that it is a photocopy of this signature which appears on the leaflet.

The other petition with the irregular line was that bearing Todd Pierce's name. Unlike Fordham, Pierce did not contend that he signed a document without the heading. Instead, he contended that he signed the leaflet. This is patently false, since the evidence is clear that the leaflet was composed of photocopies of the original signatures appearing on the petitions. In fact, a photocopy of Pierce's original signature may be found on the reverse side of the "layout" which Lenk prepared for the leaflet - it is a strip of paper about two by one-quarter inches in size.[34] Pierce's testimony that both signatures were his, but that he signed only one document, is unbelievable. I conclude that the evidence is insufficient to establish that Pierce's name on the leaflet is not a photocopy of his geniune signature appearing on a petition.

The record thus does not disclose a complete explanation for the sporadic appearance of the irregular line, except for the truism that machines occasionally act peculiarly for unknown reasons. The Employer's theory - that the irregular line represents a heading added to sheets of paper signed in blank by various employees - is highly improbable. There are numerous such petitions, but only Fordham asserted that he signed a blank piece of paper. Moreover, it is unlikely that the Union's asserted documentary alteration would have resulted in an irregular line with precisely the same curvature, touching one signatory's name at precisely the same point, on different documents. In any event, the only evidence in support of the Employer's theory - Fordham's testimony - is insufficient to establish the validity of that theory, for the reasons given above.

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[33] E. brief, p. 14.
[34] P. Exh. 12.

(b) Petitions without the Irregular Line

Carmen E. Head's testimony consists of repeated contradictions, both affirming and denying that the signatures on the leaflet and the petition were hers. Accordingly, her testimony has no probative value. Head's demonstrated signature at the hearing establishes that it was she who signed the petition.

Baskin admitted that a signature purporting to be his, on the petition, "looked" like his signature, and his demonstrated signature at the hearing proves this to be correct.

Like Baskin, Dolly Tigner admitted that a signature on the petition "looked" like hers, but she denied that it was in fact her signature. Tigner's actual signature given at the hearing establishes that it was she who signed the petition with her name on it.

(c) Summary

The credited evidence shows that Petitioner obtained employee signatures on petitions containing a heading favoring the Union and authorizing the Union to use the signatories' names. The evidence is insufficient to establish that any of the signatures appearing on these petitions were not genuine. Petitioner then made copies of these signatures, and with these copies prepared a leaflet bearing the same heading. Six of the names on this leaflet appeared on the Excelsior list, but the employees were no longer employed at the time of the election and were thus ineligible to vote. The leaflet was distributed on the day of election.

E. Legal Analysis, Conclusions, and Recommendation

It is well established that an objecting party has the burden of going forward with the evidence and the ultimate burden of proof.[35]

As indicated, I have found the evidence insufficient to establish that Petitioner engaged in any of the objectionable conduct alleged in connection with the conduct of the election.[36]

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[35] Beaird-Poulan Division, Emerson Elec. Co. v. N.L.R.B., 649 F.2d 589 (8th Cir. 1981) enf'g. 247 NLRB 1365 (1980); IDAB, Inc., 269 NLRB 554, 570 (1984), enf'd. 770 F.2d 991, 120 LRRM 2329 (11th Cir. 1985).

[36] In its brief supporting exceptions to the Regional Director's Report on Objections, the Employer argues that IHOC was the Union's agent. R.D. Exh. 1(I). It is unnecessary for me to decide this issue, since

(Continued)

Further, the evidence is insufficient to establish that the Union circulated a leaflet with forged signatures. It did circulate a leaflet with photocopies of employee signatures not proved to be forged, and the signatures of six employees who, although their names appeared on the Excelsior list, were not employees at the time of the election and were thus ineligible to vote. I conclude that these actions did not interfere with the conduct of a fair election. Accordingly, I shall recommend that the Employer's Objections be overruled in their entirety, and that a Certification of Representative issue.

IV. The Alleged Unfair Labor Practices

A. Alleged Threat to Employees Engaged in Distributing Union Literature

1. Summary of the Evidence

On the morning of 2 October 1986, union supporter Ricky Reeves, International Representative Linda Riggins, and Field Coordinator Robert Sarason were distributing literature near the entrance to the plant. Reeves was in the parking lot. According to Reeves, Production Manager Joseph C. Adams[37] came out of the plant at about 6:30 a.m. with two security guards and told Reeves to get off the property. Reeves replied that he had a right to pass out leaflets in a nonwork area during nonwork time. Adams then threatened to call the police on Reeves. Employees were present, coming to work for the first shift which began at 7:00 a.m. Adams went back into the plant, returned to Reeves in about five minutes, patted him on the shoulder, and told him that he, Adams, was in a "bad position."

According to Linda Riggins, while Reeves, Sarason, and she were "hand billing," a security guard first told Reeves to get off the property at about 6:30 a.m., and the latter asserted his right to be there. The guard then entered the building and returned with Adams and two other supervisors. Adams told Reeves to get off the property or Adams would call the police. Reeves again explained his right to be on the property distributing union literature in a nonwork area during nonwork time. Sarason joined the conversation, and suggested that Adams consult Company

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[36] IHOC members did not engage in any objectionable conduct. However, I note in passing that those IHOC members who participated in the election did not acquire apparent authority to engage in the alleged misconduct, either under the principles of Bio-Medical of Puerto Rico, 269 NLRB 827 (1984), cited by the Employer, or those of L&J Equipment Company, Inc., 278 NLRB No. 74 (1986), in which the Board accepted a 4-part test enunciated by the Court of Appeals for the Third Circuit to determine when actions of IHOC members may be attributed to a union. N.L.R.B. v. L&J Equipment Co., Inc., 745 F.2d 224, 117 LRRM 2592 (3rd Cir. 1984), remaining 266 NLRB No. 29 (1983).

[37] The pleadings appear to establish that Adams was a supervisor. Adams testified that he was responsible for production on two shifts, and that seven supervisors reported to him. I find that he was a supervisor within the meaning of the Act.

Official Shannon or an attorney. Adams left, returned in about 5 minutes, and told Reeves and Sarason that they were right.

Adams testified that a security guard informed him that an employee was handing out literature on company property. The production manager then went out and told Reeves to leave the property. According to Adams, it was about 7:00 a.m. Adams testified that Reeves complained that the guard had threatened to call the police, and denied that he, Adams, threatened to have Reeves arrested. However, he did not deny that he threatened to call the police. According to Adams, Reeves complained that Adams had "embarrassed him in front of his peers." On direct examination, Adams said that he did not recall other employees being present. However, on cross-examination he agreed that they could have been there. Adams professed that he did not recall whether Linda Riggins was present.

The Company Manager of Human Resources, Rick Shannon, testified that Adams called him about the incident, and that he, Shannon, told Adams that Reeves was allowed to engage in such activity. Shannon instructed Adams to apologize to Reeves. Adams called back a few minutes later and said that Reeves claimed to have been "humiliated."

Security Guard Theron Griffin testified that, at about 6:50 a.m., he told Reeves to leave the property if he wanted to pass out pamphlets. Reeves said that he was an employee and had a right to distribute pamphlets. Griffin replied that "We would have to call the police." The guard admitted that he saw other employees, but denied that any were within earshot of Reeves. Griffin returned to the building and saw Production Manager Adams, to whom he reported the incident. Adams left the building, approached Reeves, and had a conversation with him that Griffin could not hear. Adams returned to the building, and later went back out to Reeves, telling the latter that he was sorry and that Reeves did have the right to pass out pamphlets on Company property.

Respondent's rules which, Shannon asserted, were posted on a bulletin board, permit the distribution of written material of any kind during working time or in work areas, and the posting of such material on Company premises.[38]

2. Factual Analysis

Respondent contends that there is no evidence that the Union proponents were engaged in protected activity, since there is no evidence that the literature they were distributing was union literature. This argument borders on the frivolous. It is obvious that the "handbilling" in which Reeves, Riggins, and Sarason were engaged consisted in the distribution of union literature. Indeed, the representation case record includes documents distributed after the election by the Union "Committee for a Fair Contact," introduced by the Employer.[39]

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[38] R. Exh. 11.
[39] Employer's Exh. 13.

Riggins had the best recall of these events, and I credit her version of the incident. After a security guard told Reeves to get off Company property, Adams came out, repeated the order, and told Reeves to get off Company property or he would call the police. This testimony is corroborated by Reeves, and not explicitly denied by Adams. Griffin's testimony that *he* told Reeves the Company would call the police is not inconsistent with Reeves' contention that Adams did so.

Respondent contends that there is no evidence that any other employee heard the Adams - Reeves conversation. However, the testimony of Reeves and Riggins, tacitly corroborated by Adams, establishes that employees were going by when this conversation took place. Griffin's denial that employees were within earshot refers only to *his* conversation with Reeves. Further, Adams himself testified that Reeves complained he had been "embarrassed" in front of his peers. Reeves had been "humiliated" according to Shannon's version of Adams' report to him. On this evidence, I find that other employees did overhear the conversation between Adams and the Union advocates. Further, since these other employeees were on their way to work, it is obvious that they were not present when Adams returned 5 minutes later with the statement that Reeves and Sarason were right.

3. Legal Analysis and Conclusion

Adams' threat to call the police on Reeves for engaging in protected activitiy, the distribution of union literature during nonwork time in nonwork areas, was patently coercive. Respondent argues that Adams' admission to Reeves and Sarason, 5 minutes later, that they were right, constitutes repudiation of the threat. However, effective repudiation must include adequate publication to the employees involved, assurances to employees that their employer will not in the future interfere with their Section 7 rights, and, in fact, no proscribed conduct thereafter. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Respondent's purported repudiation fails to meet any of the *Passavant* tests. Other employees were present when Respondent engaged in the unlawful conduct, but absent when Adams made his asserted repudiation. Accordingly, there was insufficient publication of the claimed repudiation. Adams gave no assurance that the Respondent would not in the future interfere with its employees' Section 7 rights, and, as I find hereinafter, Respondent in fact did engage in such interference. In these circumstances, Respondent's assertedly published rule permitting distribution of written materials did not constitute effective repudiation. If anything, Respondent's conduct was in apparent contravention of the rule.[40] I therefore conclude that

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[40] Accord: *Safeway Stores*, 266 NLRB 1124 (1983). Respondent cites *Ducane Heating Corporation*, 254 NLRB 112, 116 (1981), enf'd. as mod. 108 LRRM 3059 (4th Cir. 1981). This case is inapposite because there is no evidence of other employees having been affected by the unlawful conduct, and thus no need for publication of repudiation. Respondent also cites *Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976), where the employer rescinded a purportedly unlawful no soliciation/distribution
(Continued)

Respondent, by threatening to call the police on an employee because he was engaged in protected activity, thereby violated Section 8(a)(1) of the Act.

B. The Alleged Discriminatory Discharges

1. The Alleged Discriminatees' Union Activities and Prior Work Records

a. Ricky Reeves

Ricky Reeves' name is the second one on the Organizing Committee (IHOC) document utilized during the election campaign,[41] the first name on the numerous petitions which formed the basis for the Union's campaign leaflet,[42] and the first name on that leaflet.[43] He was a union observer at the election. According to Reeves' credible testimony corroborated by Company official Shannon, Reeves and 11 other employees went to the office of one of Respondent's attorneys where Reeves acted as the spokesperson in protesting the Company's asserted "legal games" and "refusal to bargain with the Union." Union official Riggins suggested this visit. Further, as indicated, Reeves was the recipient of Respondent's unlawful threat when he was handbilling in the parking lot.

Subsequent to the filing of the General Counsel's brief herein, Respondent filed a letter protesting the General Counsel's characterization of Reeves as the main, leading, most vocal, or most active union proponent. Respondent asserts that Reeves was no more active than several hundred other employees. Although the Board's Rules do not allow for the filing of reply briefs in these circumstances,[44] I have considered Respondent's objection and find it to be substantially without merit. Although it may be questionable whether Reeves was the foremost union proponent, the record supports an inference that he was one of the foremost, and that he was the only one shown to have engaged in a confrontation with Respondent because of his union activities.

Reeves was employed by the Company as a cook on the second shift in October 1985, and received a raise after his 90-day probationary period. He received another raise in June 1986.

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[40] rule and replaced it with a lawful rule. There was no evidence that the employer engaged in other unlawful activity, and the Board concluded that the effect on the employees of the prior rule was so minimal that no remedy was warranted. This case, which preceded Passavant, does not support Respondent's position herein.

[41] Employer Exh. 1.

[42] E. Exhs. 3-12, P. Exh. 13.

[43] E. Exh. 1.

[44] Rules and Regulations of the National Labor Relations Board, Series 8, as amended, Section 102.42.

According to Cookroom Supervisor Mike Stiggers, Reeves complained of a strained back after lifting a tub of carrots, thus violating Stiggers' instructions to employees on proper lifting techniques. Accordingly, Stiggers on 29 October 1986 wrote a "final written warning" to Reeves that further accidents would result in "corrective action" possibly including "suspension or termination."[45] Reeves testified that he protested "this write-up" to Company official Shannon on 3 October, and that the latter promised to tear it up and not place it in Reeves' file. Shannon denied this, but admitted that he did not rely on the warning in discharging Reeves.

Stiggers testified about another asserted conversation with Reeves the following day, 30 October, during which Reeves was sitting on a table. After Stiggers criticized Reeves, the latter replied that everything was "in his kettle," i.e., that all his work had been performed. Stiggers said that Reeves was there to work. Although Stiggers asserted that he talked to Reeves about working harder, Reeves testified that he received no verbal warnings. There is no mention of this incident in Stiggers' pretrial statement.

b. Mike Collier

Mike Collier was employed as a cook on the second shift in October 1985. He signed a Union card and passed out leaflets. Cookroom Supervisor Stiggers testified that he knew Collier was for the Union.

Collier received a written warning for excessive absenteeism or tardiness on 28 March 1986.[46] Thereafter, Stiggers testified, he talked to Collier 10 times about horseplaying at work. Collier denied any such conversations. Stiggers agreed that another supervisor had advised him to reduce these admonitions to writing. However, Stiggers did not do so. I credit Collier's denial that any such conversations, or verbal warnings, took place.

Stiggers admitted that he saw Collier "holding his crotch a month or so" after Stiggers assumed his position as cookroom supervisor (August 1986). Richard Sims, a second-shift cook, testified that Collier had engaged in horseplay from the time he was hired (October 1985).

On 24 September 1986, Stiggers wrote a memorandum that Collier had been "counseled" for sweeping various work items off a table onto the floor, for insubordination, and misuse of Company property.[47] Stiggers agreed that he had no direct knowledge of these events and that he had relied on the report of another employee, Tony Purdy, a leadman. Purdy did not testify.

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[45] G.C. Exh. 3.
[46] R. Exh. 14.
[47] R. Exh. 4.

Respondent elicited evidence that, on the second shift on 29 October 1986, one of the production lines shut down because of a stoppage of sauce for the beef dinners being prepared. Collier was one of the cooks in the kitchen at that time. The problem was that an "agitator" in the "holding" kettle was not running. The evidence is conflicting on the identity of the employee responsible for running the agitator. Production Supervisor Linda Murphy testified that it is the maintenance mechanic's function if the agitator was malfuctioning, but the cook's duty if there was no malfunction. However, Richard Sims, a cook, testified that the "cooksheet" instructs cooks not to turn the agitator on when the sauce is in the holding kettle, and that it is the maintenance mechanic's function to watch the agitator. Collier contended that his kettle was full of sauce, that the pump was running, and that was the extent of his responsibility. He had no way of knowing whether sauce was flowing through the lines to the production area. Collier further testified that his supervisor had instructed him not to leave the agitator on when meat was in the sauce - as was the case in this instance - because the agitator shredded the meat. There was a dispute among the supervisors in discussion of this matter, from which discussion Collier was ultimately excluded. Production Supervisor Paul Dolak gave Collier a verbal warning. Collier talked with Company Manager of Human Resources Shannon about this subject the next day. The latter promised to get back to Collier, but never did so.

Cookroom Supervisor Stiggers asserted that, on the same day, 29 October, he saw Collier "put his hand (on) or hit" a female employee, and that the latter "brushed at" Collier as if to say, "'Leave me alone'. . .'" Stiggers said to Collier, "Stop the playing around." He then wrote a "memorandum" stating that Collier had been "counseled" for "horseplay," and to be "more attentive" to his cooking. Stiggers labeled this memorandum, "Final Written Warning."[48] The cookroom supervisor agreed that he wrote this document after the sauce incident as described above. Production Supervisor Dolak said that he was unware of this written warning.

c. Additional Evidence of Misconduct

Maintenance employee Paul H. Hollifield testified that he saw Reeves and Collier playing "meatball baseball," and hammering nailholes into a Company table. Hollifield said that he complained to supervisors about Reeves and Collier "25 or 30" times. However, there is no evidence of written warnings concerning these asserted incidents. Hollifield admitted that he thought the Union was a "bad thing," and that he talked against it in the plant. Second-shift cook Richard Sims, a union proponent who worked with Reeves and Collier, denied seeing the incidents asserted by Hollifield.

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[48] R. Exh. 5.

General Counsel's witnesses were apparently truthful, and I credit their version of the meeting.[53]

Further, I credit Collier's account of the conversation in the conference room between Stiggers and Kelly, because the specificity of Collier's testimony as contrasted with Stiggers' generalized statements, because of Stiggers' slight change of position on cross-examination, becuase of his admission that another supervisor advised him to reduce his warnings to writing, and because Collier appeared to be the more truthful witness.

3. The Events During the Second Shift on 3 November

a. Summary of the Evidence

(1) The Asserted Misconduct

Cookroom Supervisor Stiggers testified that he ran out of sauce during the second shift, but was uncertain as to the number of times. He was unaware of the reason and consulted with Production Supervisor Paul Dolak. Stiggers and Dolak decided to observe Reeves and Collier through ventilation fans on the side of the kitchen. The parties stipulated that it is possible to look through these fans into the kitchen, which is on the second floor or mezzanine, while the observers are standing on the adjoining roof of the first floor. The two supervisors did this, according to Stiggers, although Dolak was there only a part of the time.[54] There were two visits to the roof, according to Stiggers, from 7:15 to 7:45 p.m., and from 9:00 to 9:55 p.m.

Stiggers asserted that he saw Collier open his shirt, display his abdomen, make overtures to female employees, and otherwise engage in horseplay. The cookroom supervisor contended that he observed Reeves talking to employees and doing very little work. Specifically, Stiggers said that he saw Reeves taking 7-8 minutes to empty a gondola of veal into the kettle, a job which can be accomplished in about 30 seconds. Further, it took Reeves 10 minutes to remove a plastic wrap from frozen veal, when this should have been done in 15 to 45 seconds.

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[53] Sims and Copeland were current employees at the time of their testimonies, and it is therefore unlikely that they were fabricated. Bohemia, Inc., 266 NLRB 761, 764, fn. 13 (1983).
Respondent asserts contradictions in the General Counsel's evidence, e.g., that Simms "said" Shannon was not at the meeting whereas Collier affirmed that he was. In fact, Sims merely omitted Shannon's name. Respondent asserts another "contradiction" in that Sims, unlike other witnesses, supposedly testified that "only" Reeves spoke. In fact, Reeves was the only speaker named by Sims, but he did not explicity deny that other employees spoke. Finally, Respondent points to Copeland's denial that Adams asked for a "show of hands," whereas other witnesses affirmed that he did. These are minor or non-existant differences which do not affect the credibility of the General Counsel's witnesses (R. brief, p. 60).

[54] Stiggers' pretrial affidavit does not mention that Dolak accompanied him. G.C. Exh. 10.

Stiggers testified about certain notes of these events. His testimony is unclear, but he seems to have asserted that he made two sets of notes. From his testimony, the first set was apparently made on sheets from a small notepad. Stiggers appears to have claimed that he made the notes on this pad while on the roof. Although it was "quite dark" at the time, Stiggers said that he made the notes in light emanating from the kitchen through apertures in the ventilating fans. On cross-examination he appears to have asserted that he made these notes "before 12 o'clock." Although I sustained the General Counsel's hearsay objection to receipt of these notes, they appear, unaccountably, in the official exhibit file, and constitute seven sheets about 2 by 4 inches in dimension.[55] The notes contain various comments on what Stiggers assertedly observed -including Dolak in the kitchen below. Although they are critical of Reeves and Collier, they do not assert the exact details claimed in Stiggers' testimony.

The other notes consist of a copy of a 5-page memorandum from Stiggers to Shannon on letter-sized, lined notepaper.[56] This memorandum contains criticism of Reeves and Collier more nearly in accord with Stiggers' testimony. It contains a reference to Dolak's accompanying Stiggers during the second visit, at 9:00 p.m., but not the first visit.

Stiggers testified that he wrote the memorandum after coming down from the roof the second time. On cross-examination, Stiggers could not recall exactly when he wrote the memoranudm, and conceded that it could have been as late as 12:45 a.m. Nonetheless, Stiggers contended that he read this memorandum "verbatim, word for word" to Company Manager for Human Resources Shannon at approximately 11:00 p.m.[57] After this asserted conversation, Stiggers and Dolak suspended Reeves and Collier.

Production Supervisor Dolak testified that the kitchen ran out of sauce, but he could not remember the number of times. He asserted that he went up on the roof to observe the kitchen on two occasions, the first time at approximately 7:00 p.m., and the second time at approximately 9:00 p.m. It was pointed out to him that his pretrial affidavit does not mention that he went up on the roof.[58] Dolak responded that his affidavit states that he had read "the attached notes made by Staggers (and) observed the cook room."[59]

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[55] R. Exh. 8.
[56] R. Exh. 7.
[57] Stiggers' pretrial affidavit does not mention this call (G.C. Exh. 10).
[58] G.C. Exh. 11.
[59] Ibid., p. 2. As noted above, Stiggers' first notes, perhaps made on (Continued)

Dolak agreed that "the attached notes" mentioned in his affidavit refer to Stiggers' memorandum, and that this document places Dolak on the roof only during the second visit, at about 9:00 p.m.

Dolak asserted that he saw Stiggers' memorandum on the night in question. The memorandum contains Dolak's purported signature as a witness. However, Dolak denied that the signature was his. He also testified that he and Stiggers talked to Shannon. When asked whether Stiggers had any notes when talking to Shannon, Dolak replied that Stiggers "had notes on a notepad . . ." However, he did not recall whether Stiggers had the memorandum.[60]

Dolak's testimony about the activities of Reeves and Collier in general is similar to that of Stiggers.

Company official Shannon testified on direct examination that he received a call from Dolak late on the evening of 3 November, and that Dolak and Stiggers then related the asserted conduct of Reeves and Collier as set forth above. Shannon said that he concurred in the supervisors' recommendation of suspension for "gross negligence in their job performance." Shannon asserted that Stiggers' memorandum[61] was on his desk the next morning, i.e., 4 November 1986, and that he reviewed it with other supervisors. However, on cross-examination, Shannon agreed that his pretrial affidavit[62] does not mention a phone call from Stiggers or Dolak concerning Reeves or Collier, any observations of them made from the roof, or Stiggers' memorandum being on Shannon's desk the next day. The affidavit contains no reference to any such memorandum from Stiggers, and, instead, lists the charges against Reeves and Collier outlined above.[63]

Reeves' version of the second shift is that he was assigned to work on preparation of butter sauce on "D Kettle" by Cookroom Supervisor Stiggers. Reeves normally works on "A kettle." Reeves started to do this, but noted that he did not have enough butter to complete the batch. He informed leadman Tom Purdy of this fact, and Purdy said that he would go downstairs to get the butter. Stiggers came up two minutes later and said, "I heard you weren't going to make the sauce?" "No," Reeves prelied, "I don't have enough butter to complete the batch." Reeves completed this task, and then was assigned to "D kettle" by Stiggers. He started to prepare sauce for this kettle, when leadman Purdy approached, said that "he would kick (Reeves') ass," and started "putting his hands in (Reeves') face." The leadman told Reeves that "they were going to get rid of (him) and that (he) wasn't going to be there much longer." Reeves protested harassment to Stiggers, who rejected the protest. Purdy then assigned Reeves to assist Richard Sims on "kettle A," by emptying 27 boxes of veal into the kettle.

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[59] the roof, place Dolak physically in the kitchen.

[60] R. Exh. 7.

[61] R. Exh. 7.

[62] G.C. Exh. 14.

[63] Ibid., pp. 8-10.

Reeves did not have enough boxes at the outset, but more were provided. Meanwhile, this job was delayed because of the absence of the veal.

Collier testified that he was not even given the responsibility of cooking on 3 November. Instead, he was directed to help Sims and Yusuf Rashid, another cook. Collier was directed to pick up heavy items which the other cooks could not pick up themselves, and to load the kettles.

Antonio Copeland was a cook on the second shift during these incidents. He testified that the supervisors first sent Reeves to "kettle C." Copeland was next to him on "kettle D." Copeland heard leadman Purdy ask Reeves whether he was "cooking it," and Reeves answered "Yes." Copeland then heard Purdy tell Cookroom Supervisor Stiggers that Reeves was not cooking the sauce. Stiggers accused Reeves of "refusing" to do so, and Reeves replied that he was waiting for the last ingredient, butter.

Copeland contended that Stiggers was in the kitchen continuously for about a 5-hour span, and never left it. According to Copeland, one of Reeves' kettles did run out of sauce. The kettle of another cook, Rashid, ran out of sauce three times. Rashid was assisted by Collier. Rashid was not disciplined, according to Copeland.[64]

Richard Sims was Reeves' cooking partner during the second shift on 3 November, from about 4:00 p.m. until about 9:30 p.m., when Reeves was called to the office. Sims testified that Reeves did not work any differently on that shift than he did at other times. When Sims was chopping veal over the kettle, Reeves was opening the boxes of veal and placing the empty boxes in a rack over the kettle. Reeves would open five boxes of veal at a time. Sims denied that it took Reeves 10 minutes to open a box of veal. Sims also denied that Reeves stood around doing nothing. Whenever Reeves walked elsewhere, it was to get products such as butter or spices, and he did not take an inordinate amount of time to do this.

Sims stated on cross-examination that Stiggers spent "an awful lot of time in the kitchen," contrary to his usual policy which was to "pop in and out" every hour or two. Sims noticed Stiggers standing "back near the mezzanine, as though he was watching every move Rick Reeves was making." Stiggers was in the kitchen "most" of the second shift, although he was absent on occasion. Otherwise, Sims' testimony in general corroborates that of Reeves.

Collier worked on the kettle next to Sims. The latter characterized Collier as "a very good worker. On the dinner line, the sauce never ran out down there. Mike was very responsible as far as keeping up with the sauce." Sims further affirmed that Collier "would break his neck trying to help you . . . . If he was told to clean the floor, he'd clean the floor."

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[64] As noted, Rashid was the one second-shift cook who did not participate in the sickout.

As indicated, Sims testified that Collier had engaged in horseplay since the day he was hired. He would sometime raise his shirt "because his belly always lapped over his buckle." Sims called this "basic teasing." On direct examination, Sims testified that this was "common knowledge" throughout the plant, and that supervisors were present. Challenged on cross-examination, Sims could not affirm that he actually saw supervisors looking at Collier. However, although he agreed that there were areas of the plant with which he was not familar, Sims maintained that there were many areas where employees saw Collier opening his shirt.

(2) The Suspensions

Reeves testified that, at about 10:00 p.m. or shortly thereafter on 3 November, Stiggers told him to come upstairs. Reeves did so, and met Production Supervisor Dolak, Supervisor Linda Murphy, and two security guards. Dolak told Reeves that he was being suspended for negligence. When Reeves asked for more explanation, Dolak replied that Shannon would be in touch with him. The guards then escorted Reeves out of the plant.

Collier stated that Dolak spoke to him at about the same time, and said that he was being suspended because of negligence. When Collier asked how he had been negligent, Dolak told him to ask Shannon. Collier repreated the question to Stiggers. "He (Stiggers) didn't say nothing. He looked down."

The record contains apparent written suspensions of Reeves and Collier for "gross negligence of job performance," signed by Stiggers and dated 3 November.[65] Stiggers contended that he talked with Shannon on 3 November before preparing Reeves' written suspension. However, the cookroom supervisor stated that he could not recall whether he gave Reeves a copy or showed it to him. Stiggers also said that he did not recall whether he had a copy of Collier's written suspension at the time he met with the employee on the evening of 3 November, but affirmed that he promised to "get him" one.

b. Factual Analysis

The issue is whether Reeves and Collier engaged in the conduct alleged by supervisors Stiggers and Dolak. This in turn raises the question of the reliability of Stiggers and Dolak as witnesses. I conclude that they were unreliable witnesses because of discrepancies in their own statements and contradictions with the statements of others. Neither Stiggers' nor Dolak's pretrial affidavit mentions that Dolak went up on the roof. Although Dolak claimed that he went up there twice, Stiggers' memorandum has him there only once and Stiggers' "rooftop" notes have him at other times actually in the kitchen.

Stiggers' and Dolak's contention that Stiggers read over his memorandum to Shannon that night is a sheer fabrication. Dolak could only identify "notes on a notepad" as something Stiggers had while assertedly talking to Shannon. The "rooftop notes" do not contain the specific accusations against Reeves and Collier contained in the memorandum.[66]

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[65] R. Exh's 9, 10.

Stiggers could not possibly have read the memorandum to Shannon at 11:00 p.m., as he contended, if it was not even written until 12:45 a.m., which Stiggers admitted was possible. Although Shannon claimed that he received such a call, his pretrial affidavit does not mention either the call or Stiggers' memorandum which allegedly was on his desk the next morning. Dolak refused to identify his own purported signature on the memorandum. These contradictions and inconsistencies establish the unreliability of Stiggers, Dolak, and Shannon as witnesses, at least as to the asserted misconduct of Reeves and Collier.

Further, I do not credit Stiggers' testimony regarding preparation of the written suspensions. Stiggers' contention that, although he prepared Reeves written suspension before talking to the latter, he could not recall giving or showing it to the employee, is implausible. The cookroom supervisor's professed lack of memory concerning Collier's written suspension is similarly unpersuasive. Neither Reeves nor Collier mentioned a written suspension on the evening of 3 November, and I conclude that none was then given to them. I note in passing that Collier's written suspension speaks only of asserted "gross negligence," and says nothing about horseplay.

Respondent contends in effect that all of the General Counsel's witnesses were biased, the alleged discriminatees because of self interest, and Sims and Copeland because of sympathy with them. However, Sims and Copeland were current employees of Respondent at the time of their testimonies, and the Board has repeatedly held that the pecuniary interest involved in preservation of jobs makes it unlikely that such testimonies, adverse to the employer's interest, are fabricated.[67] Respondent also contends that Sims' testimony that Stiggers' was in the kitchen most of the second shift is inconsistent with other evidence that he was elsewhere, including the roof. This contention begs the question of the accuracy of Stiggers' and Dolak's testimonies.

All of the General Counsel's witnesses appeared to be truthful, and I credit their testimonies.[68]

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[66] Although I sustained the General Counsel's objection to receipt of the "rooftop notes," they are contained in the exhibit file, and Counsel for Respondent thereafter directed questions about them to Production Supervisor Dolak, after the latter failed to affirm that Stiggers had the memorandum when assertedly talking with Shannon.

[67] Bohemia, Inc., supra, fn. 53 and cases cited therein. See also Southern Paint & Waterproofing Co., Inc., 230 NLRB 429, 431, fn. 11 (1977).

[68] I note a minor inconsistency in the testimonies of Reeves and Copeland concerning the kettle to which Reeves was first assigned, but consider

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The evidence considered as a whole establishes that Reeves worked at his usual pace, which did not involve wasting time. Althought Reeves ran out of sauce on one occasion, this was due to lack of materials. Rashid - who did not join the sickout - had three such shortages, but was not disciplined. Leadman Purdy told Reeves that they were going to get rid of him, and that he wasn't going to be there much longer.

Collier was a responsible worker who did not shirk his duties. Although he may have engaged in horseplay, he had done this throughout his employment, occasionally in the presence of supervisors; as noted, Collier's suspension did not mention horseplay.

4. The Discharges

a. Summary of the Evidence Pertaining to Collier

Collier testified that he saw Shannon on 5 November, and asked in what manner he had been negligent. Shannon said that he had three statements against Collier signed by "upstairs" female employees. The substance of the asserted statements was not stated. Collier asked to see the statements, but Shannon refused. Shannon said that he would discuss Collier's case with supervisors, and Collier suggested that he discuss it with the "employees upstairs." Shannon replied that what the employees say "doesn't count." According to Collier, Shannon called Production Manager Adams into the room. Adams said that "the line went down for 34 minutes," and he wasn't going to take the blame. Adams denied this. The only other reason given to Collier for the Company's action was that "they had been having problems with the upstairs kitchen crew." Collier denied that Shannon mentioned horseplaying as a reason. Although Shannon did not give Collier a final decision at that time, he called later and told Collier that he had decided to "go along with the termination."

Shannon testified that Collier was separated on 4 November. He identified a separation notice and testified that it was prepared and signed by him on 5 November. The document is actually dated 4 November, and asserts that Collier was discharged for gross negligence and "continued horseplay."[69]

Shannon agreed that he met with Collier on 5 November. He testified that he reviewed "the events . . . of November 3rd," which included Collier's "horseplay and non-attendance to his job performance." Shannon characterized this as "gross negligence," and dismissed Collier. He denied telling Collier that he would discuss his case with supervisors and get back to him. Shannon also denied telling Collier that he had three signed

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[68] this to be an insignificant and possibly mistaken identification of kettle "C" or "D".

[69] R. Exh. 12. The separation notice asserts that Collier had been issued prior warnings on the need "to improve his work performance."

statements from other employees, that he in fact had any such statements, or that what employees say didn't count. However, Shannon's pretrial statement affirms that he told Collier, without naming names, that other employees had complained about Collier's not doing his assigned work.[70] Although Shannon's pretrial statement asserts his own conclusion, based on reports from Stiggers and Dolak, that Collier had engaged in horseplay rather than work, the statement does not relate that he accused Collier of horseplaying.[71] Shannon agreed that his own investigation of Collier's case was limited to receipt of reports from Stiggers and Dolak.

b. Summary of the Evidence Concerning Ricky Reeves

Reeves testified that he called Shannon on 6 November, and met him at the plant. The Company official told Reeves that he was being terminated because of his work performance "wasn't up to par." Shannon contended that Reeves was not being sufficiently helpful to Sims, his cooking partner. When Reeves asked Shannon whether the latter had talked to Sims about the matter, Shannon replied, "No."

Shannon testified that he told Reeves that the latter had been "grossly negligent," and was being terminated. Reeves disagreed, and said that he had been doing his job. Shannon did not contradict Reeves' testimony concerning allegations that Reeves had been insufficiently helpful to Sims.

Reeves' separation notice is dated 4 November, and asserts that he had been discharged for "gross negligence." It further alleges previous warnings for "substandard work performance and reluctance to follow instructions."[72]

c. Factual Analysis

The principle factual issues concern Collier. Although his separation notice and Shannon's testimony assert that an accusation of horseplaying was made, the absence of such accusation in Shannon's pretrial statement and in Collier's written suspension tend to support Collier's denial that Shannon made that accusation. Although Shannon claimed that the discharge was actually made on 4 Novmeber - apparently without notice to Collier -the separation notice was not prepared until the next day, when Collier met with Shannon. It may be that the horseplaying accusation was added to the separation notice as an afterthought, on 5 November. In any event, I credit Collier's denial that it was made during the discharge interview.

Collier's testimony that Shannon said he had signed statements against Collier from other employees is partially corroborated by Shannon's pretrial statement that other employees had made complaints about Collier. However, this does not establish that Shannon actually had any such statements. Collier was a more truthful witness than Shannon, and I credit his testimony concerning the discharge interview.

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[70] G.C. Exh. 13, p. 10.

[71] Ibid.

[72] R. Exh. 13.

I credit Reeves' uncontradicted testimony that Shannnon accused him of being insufficiently helpful to Sims, and that Shannon admitted not talking to Sims about the matter.

5. Respondent's Progressive Disciplinary Policy and its Application to Reeves and Collier

Company official Shannon testified that the Company has a progressive disciplinary policy consisting of verbal, written, and final written warnings.[73] As indicated above, Shannon agreed that he did not rely on Stiggers' "final written warning" based on alleged improper lifting techniques, in discharging Reeves. He also agreed that there is no record of verbal warnings in Reeves' file. The only infraction, Shannon admitted, was Reeves' "gross negligence" on 3 November. However, despite the progressive disciplinary policy, this infraction was "serious enough" to warrant Reeves' termination.

With respect to Collier, the "final written warning" on 29 October is predicated on disputed evidence as to responsibility for the agitator, as well as horseplaying. Further, Collier appears to have been warned twice for the same incident, first by Dolak and then by Stiggers. Shannon never responded to Collier's protest at what he asserted was an improper attempt to blame him for the failure of the sauce to flow on 29 October. In view of the conflicting evidence on this incident, including responsibility for the agitator and Shannon's failure to get back to Collier, the latter cannot fairly be described as culpable in this matter.

6. Legal analysis and conclusions

The General Counsel has the burden of establishing a prima facie case sufficient to support an inference that protected conduct was a motivating factor in Respondent's discharges of Reeves and Collier. Once this is established, the burden shifts to Respondent to demonstrate that the discharges would have taken place even in the absence of the protected conduct.[74]

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[73] Jt. Exh. 1, Sec. 5.

[74] Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert den. 455 U.S. 989, approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The test set forth above applies regardless of whether the case involves pretextual reasons or dual motivation. Frank Black Mechanical Services, 271 NLRB 1302, fn. 2 (1984). "/A/ finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive
(Continued)

It is obvious that the union activities in which Reeves and Collier participated constituted protected activities. With respect to the sickout, the employees were protesting asserted harassment by supervisors, i.e., working conditions, and Reeves articulated a complaint to Supervisor Adams that the Company was refusing to bargain after the Union had won the election. Although the Board and the courts have held that concerted activity may be unprotected where the employees' conduct violates federal law or is otherwise indefensible,[75] no such circumstances exist in this case. Accordingly, I find that the sickout also constituted concerted, protected activity.[76]

Inasmuch as Reeves was one of the leading proponents of the Union, was threatened by Supervisor Adams while handbilling, and was one of five cooks participating in the sickout, it is clear that Respondent knew of his union sympathies and other protected activities. Although Collier was not as outspoken as Reeves, he also participated in leafleting, and Supervisor Stiggers admitted that he knew Collier favored the Union. Further, Collier was one of five cooks who participated in the sickout. I therefore find that the Respondent had knowledge of Reeves' and Collier's union sympathies and concerted, protected activities.

The Respondent's unlawful threat to call the police on Reeves when the latter was handbilling, and Production Manager Adams' statement at the 3 November meeting that another layout would result in replacement or discharge of the cooks, evidences Respondent's animus against union sympathizers such as Reeves and Collier. Accordingly, I conclude that the General Counsel has established a prima facie case that Reeves' and Collier's union and other protected activities were motivating factors leading to their discharges.

The Respondent's asserted reason for the discharge of Reeves, "gross negligence," is not supported by credible evidence, for the reasons given above. Reeves did not fail to work nor did he waste time. Although he ran out of sauce once on 3 November, this was due to a lack of ingredients, not negligence on Reeves' part. Another employee, Rashid, ran out of sauce three times, but was not disciplined. Rashid was the only second-shift cook who did not participate in the sickout. Such disparate treatment is evidence of discriminatory motivation under well-established Board law.

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[74] established by the General Counsel." Limestone Apparel Corp., 255 NLRB 722 (1981), enfd. 705 F.2d 799, 113 LRRM 2517 (6th Cir. 1982).

[75] See authorities cited in Spencer Trucking Corp., 274 NLRB 1444, 1449 (1985).

[76] Ibid. See also Shogun Restaurant, 273 NLRB 755, 763, Conclusion of Law No. 4 (1984). Because of these findings, I need not decide whether Reeves' visit to the Company attorney's office, together with other employees, also constituted protected activity.

Reeves had received two raises in the period of slightly over a year which elapsed between his hiring and his discharge. Although he was given a warning on 29 October for assertedly lifting a tub of carrots improperly, Respondent's designation of this as a "final written warning" was excessive in light of the nature of the claimed offense. In any event, the charged offense did not relate to the asserted reason for Reeves' termination, "gross negligence." Moreover, Company official Shannon admitted that he did not take this "final written warning" into account when discharging Reeves.

Shannon further admitted that Reeves was discharged because of his asserted misconduct on 3 November solely on the basis of supervisory reports, without any independent investigation by Shannon or questionning of Reeves. This is a factor indicating discriminatory motivation.[77] Shannon also admitted that his discharge of Reeves did not follow the Company's progressive disciplinary system leading from verbal to written to final written warnings. This constitutes additional evidence of discriminatory motivation.[78]

Although Collier had more warnings than Reeves, they do not support Respondent's asserted reasons for his discharge. Collier's 28 March warning for absenteeism or tardiness is unrelated to the reasons advanced for his discharge, and took place too far in the past to have been a factor. The 24 September warning, for assertedly sweeping items off a table, was based on hearsay. The 29 October warnings, to the extent they were based on Collier's alleged responsibility for the production line running out of sauce, were the subject of a supervisory dispute, were not proved to have been substantiated, and Shannon never responded to Collier's protest over this incident. As for the supposedly determinative second shift on 3 November, Collier was not even assigned to cooking, was not responsible for any asserted failures, and the credited evidence shows that he was a good employee.

The principle distinction between Reeves' and Collier's cases is the latter's engaging in horseplay. However, Collier engaged in this activity from the day he was hired, occasionally in the presence of supervisors. Cookroom supervisor Stiggers admitted that he was aware of Collier's activities at least as early as September 1986. Respondent's witness Hollifield contended that he notified supervisors of Collier's (and Reeves') supposedly aberrant activities "25 or 30" times - yet no written warnings were ever issued and, as shown above, the evidence is insufficient to establish that Collier was ever given a verbal warning for engaging in horseplay. Finally, Collier was suspended on 3 November, not for horseplay, but for "gross negligence." Within 24 hours, in his separation notice the next day (not then communicated to Collier), horseplay appeared as an additional reason for the discharge. I conclude that this addition was an afterthought, and that Respondent had condoned Collier's engaging in horseplay.[79]

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[77] Greensboro News Co., 272 NLRB 135, 143 (1985); Beverly Enterprises, 272 NLRB 83, 89-90 (1984).

[78] St. Paul's Church, 275 NLRB 1242, 1259 (1985).

To these observations must be added the fact that Supervisor Kelley, after the 3 November employee meeting, advised Supervisor Stiggers to "write up these employees. Write them up a second time . . . a third time. Boom. They terminated . . ." All the evidence, including the unsubstantiated, exaggerated, or distorted discipline of Reeves and Collier, and Stiggers' and Dolak's contradictory assertions concerning the second shift on 3 November, warrant an inference that the warnings were concocted by the Respondent in an effort to justify the discharges of known union adherents.[80]

For these reasons I conclude that the Respondent's evidence is insufficient to establish that either Reeves or Collier would have been discharged absent the protected activity in which they engaged. Accordingly, I find that the General Counsel's prima facie case has not been rebutted, and that the discharges were discriminatorily motivated in violation of Sections 8(a)(3) and (1) of the Act.

C. The alleged prohibition against discussing terms and conditions of employment with anyone but Respondent

1. Summary of the evidence

Amelia Thompson was an employee who supported the Union, and passed out leaflets and petitions. At some time prior to 1 November, she complained to Union official Linda Riggins that she and other female employees were being sexually harassed by an inspector for the United States Department of Agriculture (USDA) who was stationed in the plant.

The Union attorney called Company counsel, and was advised that this was a matter which should be raised with Company official Shannon. Union counsel thereupon called Shannon and reported the matter. Shannon said that he would talk with the USDA official in charge, did so, and secured USDA permission to interview the employees and report back to USDA.

Thompson testified that she and other female employees were called to Company official Shannon's office on about 1 November, and were interviewed separately. Shannon told Thompson that he had received a call from Union representative Sarason informing Shannon that some employees were being harassed by the USDA inspector. Thompson replied affirmatively and said that the inspector had offered to buy things for her, and requested meeting her after work. Thompson asked Shannon to get the inspector transferred to another plant. The Company official replied that he could not do this, but promised to take Thompson's complaint and those of the other employees to the USDA. Shannon concluded by telling Thompson that, if she had a problem with the inspector or anyone else in the future, to report the matter to Shannon or Thompson's immediate supervisor, but not to talk to anyone else about the matter.

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[79] Downtown Toyota, 276 NLRB 999, 1016 (1985); Limpert Bros., 276 NLRB 364, 376-377 (1985).

[80] Rikal West, Inc., 266 NLRB 551, 567 (1983), enfd. 721 F.2d 402, 114 LRRM 3420 (1st Cir. 1983).

Shannon agreed that he met separately with three then current employees and one former employee. One of the persons he interviewed was Amelia Thompson. Shannon's description of Thompson's complaint against the USDA inspector is similar to Thompson's testimony, although he contended that the alleged conduct constituted "very unprofessional behavior" rather than "sexual harassment."

On direct examination, Shannon testified that he told Thompson she should "feel free" to discuss such matters with him or other supervisors. Thompson agreed that Shannon said this. However, Shannon denied telling Thompson that she should not discuss these matters with anyone else.[81]

The transcript of Shannon's cross-examination reads in part as follows:

> Q: Mr. Shannon, isn't it true that you would have preferred to have dealt with the issue of sexual harassment in-house rather than dealing with the Service Employees Union?
> A: I would have liked for employees to come to me if they had a problem regarding sexual harassment, that's correct.
>
> Q: And that they would come to you first, rather than going to the Union; isn't that correct?
> A: Not first or second. I just would prefer them to come to me, period.

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[81] The transcript is corrected so as to insert the words "discuss the" between the words "not" and "subject" in line 5 on page 536.

Respondent sought to question employee Charlotta Walker with respect to conversations about sexual harassment she had with Company officials. The Union and the General Counsel objected on the ground there was no complaint allegation concerning Walker, and that the proffered evidence was therefore irrelevant. Respondent contended that, if Walker testified Shannon did not instruct her not to discuss sexual harassment with others, this would tend to establish that Shannon similarly did not so instruct Thompson. I sustained the objection.

Respondent then submitted an offer of proof that Walker and another employee interviewed at the same time, Sheila Morant, if allowed to testify would assert that Shannon did not instruct them not to talk to other persons about sexual harassment. The same objection was made to proffered testimony from Shannon about his conversations with other employees, was sustained, and the same offer of proof was made. There was no exception to my exclusionary rulings.

> Q: You were not pleased that you received that phone call from me, were you?
> A: I don't like any phone call that talks about sexual harassment. I wasn't displeased that you had called me about it. In fact, I was somewhat surprised that you'd call and inform me of some issues.

Shannon reported the results of his investigation to the appropriate USDA official, who assertedly said that he would consult with his supervisor and, possibly, with Union attorney Sarason. There is no evidence that Shannon himself called Sarason about this matter. The USDA inspector about whom Thompson complained was transferred out of the plant about two months prior to the time such transfer would normally have taken place, according to Shannon.

2. Factual and legal analysis

Respondent argues that Shannon rather than Thompson should be credited because Shannon (a) would not simultaneously have prohibited Thompson from talking to other persons while telling her to "feel free" to talk to him or other supervisors about sexual harassment; (b) handled the sexual harassment issue "in cooperation" with the Union and USDA officials; (c) "would have expected continued contact with Mr. Sarason in resolving the sexual harrassment problem"; and (d) there is no evidence that the statements attributed to Shannon by Thompson were disseminated to other employees.[82]

Respondent's argument is not persuasive. There is nothing inconsistent in Shannon's telling Thompson to "feel free" to discuss such matters with supervisors while at the same time prohibiting her from doing so with others. Although Shannon agreed to handle the matter referred to him by Sarason, the Company argument that Shannon "would have expected" further contact with the Union on this issue is speculative, and Shannon did not affirm that he called Sarason back about the matter. When asked whether he preferred in-house handling of the sexual harassment issue rather than dealing with the Union, Shannon replied that he "would have liked employees to come to (him) if they had a problem regarding sexual harassment, that's correct." This admission is inconsistent with Respondent's contention that Shannon anticipated future cooperation with the Union on this matter.

Rather than cooperating with the Union, Respondent had already demonstrated its antiunion animus by threatening Reeves, and was, at about the time of Shannon's conversation with Thompson, engaged in preparation of the above-described distorted warnings concerning Reeves and Collier. Further, Shannon admitted that he would have preferred in-house handling of the sexual harassment issue. In these circumstances, it is not unlikely that Shannon would have told an employee to present such grievances to the Company rather than discuss them with others. Thompson's appearance on the witness stand convinced me that she was a more truthful witness than Shannon, and I credit her version of the conversation.

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[82] Respondent's brief, pp. 97-100.

My conclusion would not be otherwise if I had received and credited the proffered evidence that Shannon did not make a similar statement to other employees named by Respondent. Although evidence is relevant if it has a "tendency to make the existence of any fact . . . of consequence to the determination of the action more probable or less probable than it would be without the evidence,"[83] some evidence of "unquestioned relevance" may properly be excluded if its receipt would involve a "waste of time."[84] That would have been the result in this instance. In civil actions of negligence, the courts have generally excluded evidence of similar prior acts, because such evidence would introduce collateral issues.[85] Respondent's proffered evidence is intended to establish a predisposition not to engage in the same act in similar circumstances. Wigmore concludes that "a negative habit may be shown," but only if "the instances be sufficiently numerous . . . as to indicate a general course of behavior under like circumstances."[86] The instances submitted by Respondent herein are insufficiently numerous for this purpose.

The Board has agreed that the layoff of certain individuals may be discriminatorily motivated even though other employees were not chosen for such layoffs.[87] In another case, the Board stated that the fact that the employer "did not choose to compound the wrong by picking out union adherents for layoff (at one plant) can hardly cure the unlawful nature of (the employer's) initial decision causing the layoffs."[88] As set forth above, I conclude that the proffered evidence as detailed in Respondent's offers of proof, even if received, would have insufficient probative weight to overcome the likelihood that Shannon did make the statement attributed to him by Thompson, or to overcome the latter's inherent credibility.

Thompson's grievance, asserting sexual harassment at the workplace, concerned her working conditions. As set forth above, Shannon told Thompson that if she had a problem with the USDA inspector or anybody else in the future, i.e., a problem involving sexual harassment, she would be free to discuss the matter with Shannon or her immediate supervisor, but that she was not to discuss it with anybody else.[89] This rule was so broad that it precluded Thompson from discussing sexual harassment with other employees in addition to preventing her from bringing it to the attention of the Union. It is clear that such a rule is impermissibly broad, and is violative of Section 8(a)(1) of the Act.[90] Respondent's argument that there is no evidence the rule was disseminated to employees other than Thompson is an insufficient defense, since such a statement made to only one employee is violative of the Act.[91] I conclude that Respondent, by Supervisor's Shannon's statement to Thompson, thereby violated Section 8(a)(1) of the Act.

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[83] Federal Rules of Evidence, Rule 401.
[84] Ibid., Rule 403 and Advisory Committee Note.
[85] Amer. Juris. 2d, Vol. 29, Sec. 315.
[86] Wigmore, Evidence (Chadbourn edition), Vol. 2, sec. 376 (1979).
[87] Rea Trucking Co., Inc., 176 NLRB 520 (1969).
[88] Ethyl Corporation, 231 NLRB 431, 433 (1977).

D. The alleged unilateral change in disability pay policy

1. Summary of the evidence

The complaint alleges that Respondent unilaterally changed its disability pay policy on about 1 June 1986 without notice to or consultation with the Union. Respondent agrees that there was a change, but contends that it took place on about 1 May 1986, and thus prior to the date of the election (23 May) and more than 6 months prior to the filing date of the first charge in this case (10 November 1986). The evidence is both documentary and testimonial in nature.

The parties stipulated that Georgia law provides that employees injured at work are not to be compensated for their injuries for the first 7 days. Respondent's Director of Human Resources Shannon testified that, in January 1986, he decided to pay employees for the first 3 days of this 7-day waiting period, because he considered it good policy. However, the policy was not accurately implemented for various reasons, and Shannon issued a memorandum on 6 February explaining that employees were to be compensated for the first 3 days of a work-related accident as verified by a doctor's statement.[92] Shannon identified a list of employees with work-related injuries showing that, of nine employees with such injuries during the last quarter of 1985, none received compensation for the first 3 days. Thereafter, beginning 6 January and continuing for several months, some employees received such benefits and some did not.[93] Shannon testified that his new policy was not uniformly followed despite his February memorandum, because of the advent of new supervisors who did not understand the policy, and because of computer and clerical errors.

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[89] The pleadings appear to establish Shannon's supervisory status. On the basis of the pleadings and the record evidence, which contains ample indicia of such status, I conclude that Shannon was a supervisor within the meaning of the Act.

[90] Pontiac Osteopathic Hospital, 284 NLRB No. 51 (1987); Scientific-Atlanta, Inc., 278 NLRB No. 90 (1986); "The Loft", 277 NLRB 1444 (1986); A.L.S.A.C., 277 NLRB 1532 (1986). There is no evidence that the Respondent considered sexual harassment of its employees to be information confidential to the Company, such as comparative wages. Cf. L. G. Williams Oil Co., 285 NLRB No. 48 (1987).

[91] Flex Plastics, Inc., 262 NLRB 651, 659-660 (1982), enfd. 726 F.2d 272, 115 LRRM 3036, 3040 (6th Cir. 1984).

[92] G.C. Exh. 4.

Shannon further asserted that Respondent decided to eliminate this 3-day payment "at the end of April 1986" because it caused people to stay out of work longer than they needed to do so. Accordingly, after meeting with supervisors, Shannon decided to discontinue the policy effective 1 May. There is no evidence that Respondent documented this asserted elimination of the 3-day policy with a memorandum, as it did the implementation of the policy in February.

Respondent's records show that it continued to pay some 3-day benefits and to deny others until 13 June, when the last such payment was made. Thereafter, beginning with the first nonpayment on 16 June and for the remainder of 1986 and about the first 3 months of 1987, no such payments were made to any of numerous employees with work-related injuries.[94] Shannon acknowledged the continued payments after 1 May. "Some were paid and some weren't. The same as had occurred before." Shannon claimed that this "was not to happen," but agreed that he was responsibile for the continued payments. The Director of Human Resources also agreed that he did not notify the Union of this mid-June change of policy, which date he later corrected to 1 May.

Reeves was one of the employees who was given 3-day disability pay subsequent to the asserted elimination of the policy, for an injury sustained on 4 June.[95] Reeves testified that he was injured again on about 27 July, and that his supervisor at the time, Dan Rhymer, told him that he would receive disability pay and so marked his time card.[96] Reeves affirmed that he was not compensated for this injury, and protested to Company official Shannon at about the end of July. According to Reeves, Shannon said that the policy had changed "about a month before (Reeves') injury," i.e., about 27 June, that Shannon had notified the supervisor, and that the latter should have notified Reeves. Shannon did not contradict this testimony, and Rhymer did not testify.

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[93] G.C. Exh. 5.

[94] Ibid.

[95] G.C. Exhs. 5, 6.

[96] G.C. Exh. 6. A photostat of Reeves' timecard for the period ending 27 July is in evidence, and the word "Disability," although faint, appears in the spaces for the last 3 days. Reeves' timecard for the June disability also contains very faint markings appearing to show the word "Disability." However, immediately below these faint markings the printed word "Disability" appears clearly, followed by a clearly imprinted but somewhat illegible word which appears to be "pan," or "pair" (pay?). R. Exh. 17.

2. Factual analysis

Respondent's records are more persuasive than Shannon's testimony. They show two periods of nonpayment (for the first 3 days of work related injuries), the first period being the last quarter of 1985, and the second period beginning on 16 June 1986 and continuing into 1987. Shannon's explanation of the continuation of such payments after 1 May - his asserted date of the elimination of payments - is almost nonexistent. About all that he contends is that the same thing happened again, i.e., alleged "errors." However, Shannon gives no explanation for the fact that the second unbroken series of nonpayments began on 16 June, just as the last one ended at the close of 1985. This is consistent with Reeves' uncontradicted testimony, which I credit, that Shannon told him that the policy changed about a month before Reeves' 27 July accident.

For these reasons, I find that Respondent changed its disability policy on about 16 June so as to eliminate payment for the first 3 days of disability.[97] I credit Shannon's testimony that this change was made without notice to the Union.

3. Legal analysis and conclusions

The foregoing discontinuance of disability pay constituted a unilateral change in employees' terms and conditions of employment which took place while the employer's objections to an election were pending. I have concluded that the objections herein are without merit, and that a certification of representative should issue. The Board has stated the law in such circumstances as follows:

> The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made (authority cited). And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes (authority cited). Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow

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[97] Respondent's reliance on the absence of the word "pay" after the word "disability" on Reeves' July timecard (G.C. Exh. 6), as contrasted with the asserted addition of that word on the June timecard (R. Exh. 17), has little probative value because the evidence cited above shows that the policy change was made in mid-June, and because the June timecard has markings which suggest an addition to it subsequent to the original entries (R. Exh. 17).

an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending.[98]

I therefore conclude that Respondent, by its unilateral change in disability pay policy on about 16 June so as to eliminate such pay for the first 3 days of disability, thereby violated Sections 8(a)(5) and (1) of the Act.[99]

E. The alleged refusal to bargain over denial of a wage increase

1. Summary of the evidence

(a) Respondent's wage increase polices

The complaint alleges that the Respondent, since about 1 December 1986, refused to bargain with the Union over its denial of a wage increase, thus violating Sections 8(a)(5) and (1) of the Act. Much of the evidence pertains to the Company's policies concerning pay increases. The plant opened in 1985, and prospective employees were interviewed in that year.

Irma Jean Ming testified on direct examination that she was interviewed in August 1985 by supervisor Freddie Whatley, and that the latter told her she would get a raise after her probationary period and every 6 months thereafter. On cross-examination, Ming stated that Whatley told her she would receive a performance evaluation every 6 months and a raise based on her performance. On further questioning, however, Ming testified that she was not evaluated prior to receiving her first raise in January (after the probationary period), nor her second raise, in June. In November, some time before Ming left the Company, Whatley called her into his office and told her that that was her "evaluation."

Ming further testified that she attended a meeting of 75-100 employees in October 1985. The meeting was conducted by Company official Rick Shannon, and employees were told that they would receive a raise after the 90-day probationary period and every 6 months thereafter.

Ricky Reeves testified that he had a conversation in October 1985 with Supervisor Whatley. According to Reeves, Whatley said that employees would receive raises twice a year, in June and December. Reeves also testified that, in a meeting he had with Shannon at about the same time in the latter's office, the Company official said the same thing. According to

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[98] Mike O'Connor Cheverolet, 209 NLRB 701, 703 (1974), revd. on other grounds 512 F.2d 684 (8th Cir. 1975); see also Master Slack, 230 NLRB 1054, fn. 3 (1977).

[99] Since the change took place in mid-June, and the Union filed an unfair labor practice charge alleging unlawful changes on 10 November (G.C. Exh. 1(a)), it is obvious that Respondent's tacit argument based on Section 10(b) of the Act is without merit.

Reeves, Shannon declared that Reeves would be making $10 hourly at the end of the year. On cross-examination, Reeves testified that Shannon said the same thing to him in Shannon's office in May 1986. Reeves denied that anybody cautioned him about any "misunderstanding" he might have had about "automatic" raises.

Reeves also testified that he attended a meeting in a breakroom in October 1985, where a supervisor named "Jerry," utilizing an overhead camera, showed a projection of two raises yearly.

Linwood Barber, a sanitation worker, was hired in November 1985 at $6.20 hourly, and testified that Shannon then told him that he would get a 15-cent raise after 90 days and subsequent raises twice yearly averaging 75 to 90 cents, so that Barber would be making about $10 hourly at the end of a year of employment. Barber further averred that he received a 15-cent raise at the end of his probationary period. On cross-examination, Barber agreed that the raises assertedly promised by Shannon would not reach $10, and stated that he was making $6.65 at the time of the hearing. Barber denied that Shannon said the raises depended upon an evaluation.

Production supervisor Whatley hired employees before the plant opened. He testified that, pursuant to instructions from Shannon, he told employees that they would receive raises after their probationary periods and every 6 months thereafter "if they qualified." However, Whately agreed that there was no evaluation process at the time he interviewed employees. Although the Company was working on an evaluation policy, none had been approved as late as the date of Whatley's testimony (13 May 1987). All employees of whom Whatley had knowledge received raises if still employed at the end of their probationary periods. Whatley identified a Company handbook explaining wage policies, but denied that he ever gave it to employees.[100]

On 4 June 1986, Union official Linda Riggins wrote Shannon a letter stating that the Union had learned that the Company was refusing to grant "the June 1986 wage increase," and that the Union would file unfair labor practice charges in such event.[101] On 20 June, Plant Manager James Beno wrote a memo to employees stating that the June increase would be made "pursuant to the promise . . . previously made . . . (but) not because of any threat by the Union."[102]

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[100] The handbook states that wages paid by other firms in the area will serve as "guidelines" for the Company's determination of its wages, and that "salary surveys" will be conducted once a year for this purpose.

"Pay will progress on the basis of merit. Wage and salary increases are intended to reward overall job performance and are not given on the basis of length of service alone."

Finally, in a separate subsection, the handbook provides for a "performance appraisal interview" every 6 months after the end of the probationary period. "This is an especially good time to discuss your present and future opportunities with your supervisor. You will be given a copy of your performance appraisal . . .

If you are a salaried employee, you will be given a formal performance appraisal interview and considered for a merit increase once each year" (Jt. Exh. 1, "Compensation Practices").

The testimonies of the General Counsel's witnesses, Production Supervisor Whatley, and Director of Human Resources Shannon establish that all employees except maintenance mechanics who had completed their probationary periods received a wage increase at the end of such periods and again in June 1986 without any evaluation of their individual qualifications. The maintenance mechanics had received a raise in March.

Although Whatley said that he did not distribute handbooks which stated a merit policy with respect to raises, Shannon contended that he did distribute them, but then had to recall the copies because they had not been authorized. Shannon asserted that another supervisor interviewing potential employees was misstating Company wage policy, and that Shannon had to correct this. However, it was brought to Shannon's attention in October 1985 that employees still did not understand the Company's policy. Accordingly, Shannon and a supervisor named "Gary Grayburn" held employee meetings. Grayburn concentrated on production, and told employees that the Company was then losing "close to a million dollars per month." Shannon asserted that Grayburn did not discuss wages - Shannon himself did so, and emphasized to employees that raises would be based on performance reviews.[103] Shannon denied that he promised anybody "automatic" raises. However, as noted, Shannon agreed that the raises at the end of probationary periods and those in June 1986 were made without performance appraisals.

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[101] The letter reads as follows:

It has come to the Union's attention that the Company is refusing to grant the June 1986 wage increase. Please be advised that the Union will not file charges if the Company grants the June, 1986 wage increase. Please be further advised that the Union will file unfair labor practice charges if the Company refuses to grant the June, 1986 wage increases.

Follow the Law, Grant the Wage Increase (G.C. Exh. 8)!

[102] The memo reads as follows:

When we opened this facility, we informed you that there would be a wage review in June, 1986. We have completed that wage review, and we are pleased to announce that all hourly non-exempt employees who have had more than 90 days of service as of June 16, 1986, will receive a 4% increase in their next paycheck. Maintenance employees who received an increase in March, will not receive this announced increase.

This wage increase is pursuant to the promise we previously made to you. It is not because of any threat by the union, which is apparently trying to take credit for the increase. We promised you this wage review before the union came along and we live up to our promises -- union or no union. The 4% increase is across the board and does not reflect an individual judgment that an employees' (sic) performance is necessarily acceptable.

Despite this wage increase, you should be aware that we continue to have certain problems. Our cost per case remains too high compared to our other facility and the anticipated cost at the planned new facility. We hope that this wage increase will prompt an increase in productivity and a long term decrease in our cost per case. If not, we will have to consider other ways to address this problem.

Please see Rick Shannon or me if you have any questions about this (G.C. Exh. 18).

Plant manager Beno testified that an across-the-board raise was given in June because there was no fair method in place to evaluate 400 employees. Beno asserted that the June 1986 increase of 4 percent was based on "the amount of money that was in the budget." He also affirmed that the 1987 budget provided for two increases without specifying the existence of a performance appraisal system.

Director of Human Resources Shannon testified about a long and unsuccessful attempt to get higher corporate approval of a performance appraisal form. After two such failures in 1985, Shannon made another attempt in September 1986. After numerous revisions, it was put into effect on 24 March 1987, according to Shannon. As noted, Whatley on 13 May 1987 denied that there was any such plan in effect. Shannon agreed that his pre-trial affidavit[104] states that his intent was to have the evaluation system in place for "the December raises." However, at the hearing, Shannon denied this, and said that his intent was to have the system ready for "the December reviews."

(b) Evidence concerning alleged refusal to bargain over denial of a December wage increase

As set forth above, there was employee dissatisfaction with the Respondent's refusal to accept the results of the May election, based on the asserted objections thereto. Thus, sometime prior to November, Reeves and other employees, at the Union's suggestion, protested to Respondent's attorney about "legal games" and the Company's "refusal to bargain." Following the sickout, Reeves made the same protest to Production Manager Adams at the 3 November meeting. On 10 November, the Union filed an unfair labor practice charge alleging that Respondent had "refused to bargain" with the Union on or about 23 May and thereafter, and had made "unilateral changes" without bargaining.[105] On 9 December, the Union sent Shannon a memorandum stating that it had learned the Company was refusing to grant

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[103] Grayburn did not testify.
[104] G.C. Exh. 17.
[105] G.C. Exh. 1(a).

"the December, 1986 wage increase" and advising the Company that, in such event, the Union would file unfair labor practice charges.[106]

Linda Riggins credibly testified that the Company did not respond to this memorandum. On 11 February 1987, the Union filed an unfair labor practice charge alleging that Respondent, since 1 December, had "refused to bargain with the Union" and had made "unilateral changes" in order to discourage union activities.[107] As indicated, the complaint alleges that Respondent refused to bargain with the Union on or about 1 December over Respondent's denial of a wage increase.[108]

Riggins and Plant Manager Beno testified that there was no wage increase in December. According to Beno, the reason was the fact that the evaluation system was not yet ready.

2. Factual analysis

The testimonies of the General Counsel's witnesses, corroborated by Respondent's witness Whately, establish that the Comapny promised its new employees a raise after successful completion of their probationary periods, and additional raises twice yearly thereafter. The factual issues are whether Respondent conditioned such raises upon an employee's successful performance evaluation, and whether it established a practice of giving raises without such evaluations.

With respect to the issue of what the Company promised new employees, Barber explicitly denied that a successful evaluation was a condition of a raise,[109] and was partially corroborated by Reeves' denial that anybody spoke to him about any "misunderstanding" concerning "automatic" raises.

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[106] The memorandum, signed by Field Representative Linda Riggins, reads as follows:

> It has been brought to the Union's attention that the Company is refusing to grant the December, 1986 wage increase. Please be advised that the Union will not file charges if the Company grants the December, 1986 wage increase. Please be further advised that the Union will file unfair labor practice charges if the Company refuses to grant the December, 1986 wage increase.
>
> Follow the Law, Grant the wage increase (G.C. Exh. 9)!

[107] G.C. Exh. 1(l).

[108] G.C. Exh. 1(p).

[109] Respondent argues that Barber's assertion that Shannon told him he would be making $10 hourly within a year is unrealistic, considering Barber's job classification as a sanitation worker. However, Reeves testified that Shannon said the same thing to him, and it is entirely possible that Shannon gave some employees an exaggerated estimate of their future earnings.

Although Ming testified on cross-examination that Whatley told her she would receive a performance evaluation every 6 months, the importance of this testimony is diminished by Ming's later clarification that Whatley told her some time before Ming quit that a discussion Whatley then had with her in his office was her "evaluation." Reeves' description of Shannon's two explanations of raises in Shannon's office contains no reference to evaluation appraisals, and is uncontradicted.

It is unquestioned that Respondent held a meeting of employees in October 1985, in which raises were discussed. Ming's and Reeves' description of that meeting consistently omit any reference to an evaluation as a requirement for raises twice yearly. Both Reeves and Shannon mentioned a supervisor who talked to employees - Reeves called him "Jerry" and Shannon said his name was "Gary Grayburn." I infer that these names refer to the same person. I credit Reeves' testimony that "Jerry" (Grayburn) projected raises twice yearly from an overhead camera, and I do not credit Shannon's denial that Grayburn discussed wages.

The documentary evidence does not assist Respondent's cause. Although Beno's 20 June memo to employees states that the 4 percent across-the-board raise granted that month did not reflect a judgment that an individual employee's performance was acceptable, the document does not even mention performance appraisals much less condition future raises upon them. Instead, the memo justifies the raise on the basis of "the promise we previously made to you."

The employee handbook does not help the Company's case. In the first place, Whatley and Shannon could not agree whether the handbook was even distributed, and, in any event, it was not authorized according to Shannon. The text of the handbook refers only to "formal appraisal interviews" for salaried employees, apparently as a condition for a "merit increase" once each year. Unsalaried employees were to be given performance appraisals every 6 months, not specifically for the purpose of qualifying for a raise, but in order to provide opportunities to discuss their future with the Company.

Finally, Beno's description of the rationale for the June 1986 raise and projected 1987 raises shows that these were across-the-board raises based on budgetary considerations.

On the basis of the totality of the credible evidence, I conclude that Respondent promised new employees a raise after the 90-day probationary period, and raises twice yearly thereafter, in about June and December, without any condition of a successful performance appraisal.

It is unquestioned that the Company granted two raises without any such evaluations - at the end of each employee's probationary period, and an overall raise in June 1986. Respondent's argument that it did not grant a December 1986 increase because its performance appraisal system was not yet in place is unpersuastive. Respondent had previously given two raises without evaluations, and its witnesses could not even agree at the time of the hearing whether an evaluation system was then in place - after almost 2 years of trying.

I conclude that the raises actually given established a practice of giving employees raises after their probationary periods and periodic raises twice yearly thereafter, in June and December, based on budgetary considerations. Although Respondent contends that such raises were contingent upon a successful performance evaluation of each employee, the fact that Respondent gave two such raises without such evaluations at times when there was no performance appraisal system in place establishes, at the least, a practice of omitting the evaluation requirement in such circumstances. It is undisputed that no evaluation system had been established by December 1986, the time of the asserted withholding of a wage increase. Although Respondent's prior practice is established by only two instances of prior raises, these two instances cover the entire period of the plant's existence, and were preceded by explicit promises of such raises by Respondent to new employees. I therefore conclude that Respondent's failure to grant a December wage incease was a departure from such prior practice.[110]

The remainder of the evidence is uncontested. The employees twice protested the Company's "refusal to bargain," while the Union sent a memo protesting the failure to grant "the December wage increase," and filed an unfair labor practice charge alleging both a refusal to bargain and unilateral changes.

3. Legal analysis and conclusions

Section 8(d) of the Act sets forth the obligation of the parties to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." In addition, the employer may not impose new or different working conditions without first giving the employees' representative an opportunity to bargain over them.[111] Since Respondent's denial of a wage increase in December 1986 constituted a withdrawal of a previously established privilege and thus a departure from past practice as well as a denial of its promise to employees, and since Respondent failed at its peril to consult the Union about these matters pending resolution of its objections to the election,[112] it would appear that Respondent thereby violated Section 8(a)(5) and (1) of the Act.[113]

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[110] Plasticrafts, Inc. v. N.L.R.B., 586 F.2d 185, 99 LRRM 3204 (10th Cir. 1978), enfg. as mod. 234 NLRB 762 (1978); Memphis Furniture Manufacturing Co., 252 NLRB 303 (1980). In cases where there is a clearly established departure from prior practice, there need be no finding that the withholding of a wage increase was discriminatorily motivated. Plasticrafts, supra. Although there is evidence of antiunion animus in this case, I make no finding on whether the withholding was motivated by such animus because of my conclusion that Respondent departed from prior practice.

[111] A. H. Belo Corp. v. N.L.R.B., 411 F.2d 959, 970, 71 LRRM 2437 (5th Cir. 1969), cert. den. 396 U.S. 1007.

However, the complaint alleges that the gravamen of Respondent's offense was its refusal to bargain with the Union over its denial of a December wage increase, not the unilateral change described above. The Board and at least three circuit courts of appeal have held in similar circumstances that a variance of this nature does not deny a respondent due process. Thus, in George C. Foss Co. v. N.L.R.B., 752 F.2d 1407, 118 LRRM 2746 (9th Cir. 1985), enfg. 270 NLRB 232 (1984), the complaint alleged and the General Counsel contended that the employer discharged certain employees discriminatorily because of their membership in one union (NAIU). However, the Board found that the illegality of the discharges was based on the fact that the employer, after signing a contract with another union (IBEW), discharged the employees without giving them the 7-day grace period provided by Section 8(f) of the Act before requiring them to become memebers of IBEW. On appeal, the employer contended "that its due process rights were violated because it was found guilty of an unfair labor practice that was not charged in the complaint" (id., 752 F.2d at 1411).

In an exhaustive review of the authorities, the Court of Appeals for the Ninth Circuit noted that the Board is "not subject to the technical pleading requirements that govern private lawsuites, . . . (and that) where the issue is fully and fairly litigated at the administrative hearing, the Board may find an unfair labor practice even though no specific charge is made in the original complaint." Citing Blake Construction Co., 663 F.2d 272, 279 (D.C. Cir. 1981), the Ninth Circuit noted the District of Columbia Circuit's willingness to enforce a Board order where there had been a "meaningful opportunity to litigate the underlying issue. . . ." The Ninth Circuit characterized the issue before it in Foss Company as "largely a technical and semantic distinction . . . . In addition, the Company had ample opportunity to litigate the violation as found by the ALJ . . . ." (id., 752 F.2d at 1411-1412). The court concluded as follows:

> Finally, even if the Company had not understood the issue at the hearing, it was "fully litigated" in the sense that there was no more exculpatory evidence that could have been introduced. Although the Company states in its opening brief that it could have proved a number of things to escape liability, it cites no authority for the proposition that the allegedly exculpatory evidence would be a defense to a charge of discharging workers before the grace period expired . . . (id).

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[112] Supra, fn. 98.

[113] Plasticrafts, Inc., supra, fn. 110; City Cab Co. of Orlando, v. N.L.R.B., 122 LRRM 2392 (11th Cir. 1986), enfg. 273 NLRB 1344 (1985); Auto Fast Freight, 272 NLRB 561 (1984), enfd. 793 F.2d 1126, 122 LRRM 3058 (9th Cir. 1986); Meilman Food Industries, Inc., 234 NLRB 698 (1978), enfd. 108 LRRM 2174 (D.C. [illegible] 1979).

More recently, the Court of Appeals for the Second Circuit has expressed similar views in a case where the Board's findings varied somewhat from the precise allegation in the complaint. NLRB v. Chelsea Laboratories, Inc., 125 LRRM 3428 (2d Cir. 1987), enfg. 282 NLRB No. 74 (1986).

In this case, the issue of whether Respondent's refusal to grant a December 1986 raise constituted a departure from past practice was extensively litigated. I therefore conclude, for the reasons given above, that by such action without notice and an opportunity for the Union to bargain Respondent thereby violated Sections 8(a)(5) and (1) of the Act.[114]

F. The alleged unilateral layoff of employees

Respondent's Director of Human Resources Shannon testified that he told employees there would be a layoff in February 1987 and asked for volunteers,[115] without notifying the Union. Thereafter, on 23 February 1987, 22 employees were laid off without such notification.[116]

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[114] Counsel for the General Counsel states in his brief that "any request to bargain over such refusal (to grant a December wage increase) would have been futile in light of Respondent's action in testing the certification" (G.C. brief, p. 9). In support of this position, counsel cites Sunnyland Refining Company, 250 NLRB 1180 (1980), and Williams Energy Company, 218 NLRB 1080 fn. 4 (1975). The tacit premise in this argument - - that the Union did not request bargaining -- is at least arguable. See, e.g., N.L.R.B. v. Columbian Enameling and S. Co., 306 U.S. 292, 297-298 (1939); Barney's Supercenter, Inc., 128 NLRB 1325, 1327 (1960), enfd. 296 F.2d 91 (3rd Cir. 1961); Al Landers Dump Truck, Inc., 192 NLRB 207, 208 (1971); Schreiber Freight Lines, 204 NLRB 1162, 1168 (1973); Marysville Travelodge, 233 NLRB 527, 533 (1977) enfd. 106 LRRM 2471 (9th Cir. 1981); Columbia Engineers, 268 NLRB 337, 340 (1983); Trucking Water Air Corp., 276 NLRB 1401, 1407 (1985); and Tile, Terrazzo & Marble Contractors Association, 287 NLRB No. 79, ALJD pp. 26-28 (1987). However, I need not pass on the issues of whether the Union made a request to bargain, whether such request would have been futile, or whether Respondent refused to bargain on the December wage increase issue, in light of my finding above that it failed to give the Union notice and opportunity to bargain over its unilateral discontinuance of a wage increase in December 1986.

[115] R. Exh. 22.

[116] Shannon identified an exhibit containing a list of 24 names as those employees who were laid off (G.C. Exh. 7). However, he later testified that two of the individuals whose names appear on the list (Malline Gleen and Janet Walker) were not laid off because work became

(Continued)

Respondent's witnesses contended that the reason for the layoffs was excessive inventory. Over 40 employees "volunteered,"[117] and, since this was more than the Respondent needed, a selection was made among the volunteers on a seniority basis. All the laid-off employees were back at work within a few weeks, according to Respondent's witnesses.

In a similar case, the Board stated as follows:

> Although an employer may properly decide that an economic layoff is required, once such decision is made the employer must nevertheless notify the Union, and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected. By failing to so notify the Union while its objections to the election were pending, Respondent acted at its peril and, since the Union was thereafter certified as the collective bargaining representative of its employees, Respondent thereby violated section 8(a)(5) and (1) of the Act.[118]

I reach the same conclusion herein, and find that Respondent's layoff of 22 employees on 23 February 1987, without notification to the Union, violated Section 8(a)(5) and (1) of the Act.

In accordance with my findings above, I make the following:

Conclusions of Law

1. The Respondent, The All American Gourmet Company[119] is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[116] available. Without these two employees, the following names appear on the list:

Ethel Hill
Linda Wright
Paulette Ellison
Valerie Berry
Scedro Williams
Mary Davenport
Sherry Nelson
Charlanda Wyser
My Diep
Arthur Thomas
Patricia Jones
Kinh Tua Nguyen
Dieu Minh Hoang
Minh Pham Hoang
Charles Boyd
Veester Murphy
Celestine Lawrence
Penny Stembridge
Ida Howell
Canetra English
Gwen Wright
Brenda Parks

[117] R. Exh. 23.

[118] Clements Wire, 257 NLRB 1058, 1059 (1981).

[119] Although the pleadings in some instances omit the word "Company" in the Respondent's name, the Respondent in its formal pleadings includes that word, and I do the same.

2. Service Employees International Union, Local 579, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling an employee that it would call the police on him because he was engaging in protected activity, and by telling an employee that she could not discuss terms and conditions of her employment with anybody but Respondent's representatives, Respondent thereby violated Section 8(a)(1) of the Act.

4. By discharging employees Ricky Reeves and Mike Collier on 4 November 1986 because of their membership in and activities on behalf of the Union, and because they engaged in protected concerted activities with other employees for the purpose of mutual aid and protection, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. The following unit is now and has been at all times material herein an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent at its 5475 Bucknell Drive facility in Atlanta, Georgia, including all maintenance mechanics, maintenance crew leaders, tool crib attendants, tool crib leaders, sanitation aides, sanitation crew leaders, food preparers, food preparer-leaders, cooks, cook leaders, material handlers, material handler leaders, production assemblers, machine operators, line attendants, q.c. inspectors and line leaders, but excluding all other employees, temporary employees, office clerical employees, guards and supervisors as defined in the Act.

6. On 23 May 1986, in an election conducted by the Board, a majority of the employees in the unit described above designated the above-named Union as their representative for the purposes of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions or employment.

7. By engaging in the following unilateral actions without notifying the Union and giving it an opportunity to bargain over such matters, Respondent thereby violated Section 8(a)(5) and (1) of the Act:

(a) On or about 16 June 1986, changing its disability pay policy so as to delete disability pay for the first three days of disability;

(b) Failing to adhere to its previously established policy and promise to employees to grant across-the-board raises twice yearly, in June and December, by failing to give such raises in December 1986;

(c) On 23 February 1987, by laying off the 22 employees listed above in footnote 112.

8. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully discharged Ricky Reeves and Mike Collier on 4 November 1986, it is recommended that Respondent be ordered to offer each of them immediate and full reinstatement to his former position, or, if such position no longer exists, to a substantially equivalent position, dismissing if necessary any employee hired to fill said position, and to make each of them whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying each of them a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatment, less net earnings during such period, to be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289 (1950), with interest as computed in New Horizons for the Retarded, 283 NLRB No. 181 (1987).[120]

It having been found that Respondent unlawfully changed its disability pay policy on 16 June 1986 so as to eliminate disability pay for the first 3 days of disability, it is recommended that Respondent be required to reinstate such policy forthwith, to make each employee affected thereby whole for any loss earnings he or she may have suffered by reason of Respondent's unlawful discontinuance of said policy, by paying him or her the amount of money he or she would have received absent Respondent's unlawful change of policy, with interest computed as described above,[121] to notify the Union prior to any future change in such policy and, upon request, bargain with it over this matter.

It having been found that Respondent unlawfully changed its policy of granting periodic raises by failing to give raises to its employees in December 1986, it is recommended that Respondent be required to make its employees employed at that time whole for the loss of earnings they suffered because of Respondent's failure to give such raises, by granting them raises retroactively to December 1986 in such amounts as normally would have been granted to them, with interest computed as described above,[122] to notify the Union prior to any future change in such policy, and upon request, bargain with it over this matter.

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[120] Under New Horizons, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. Sec. 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in Florida Steel Corp., 231 NLRB 651 (1977).

[121] Master Slack, supra, fn. 98.

It having been found that, on 23 February 1987, Respondent unlawfully laid off the 22 employees listed above,[123] it is recommended that Respondent be required to offer reinstatement to any such employee it has not already reinstated, and to make each laid off employee whole for any loss of earnings he or she may have suffered by reason of Respondent's unlawful conduct, by paying each of them a sum of money equal to the amount he or she would have earned from the date of his or her unlawful layoff to the date of his or her reinstatement, or to the date of Respondent's offer of reinstatement, less net earnings during such period, with interest computed as described above.[124] It is further recommended that Respondent be required to notify the Union prior to any future layoffs, and, upon request, bargain with it over this matter.

It having been found that Respondent unlawfully ordered Amelia Thompson not to discuss her terms and conditions of employment with anybody except Respondent's supervisors, it is recommended that Respondent be required to notify her in writing at her last-known address that this order is withdrawn, and that she is free to discuss her terms and conditions of employment while employed by Respondent with anybody. Although Thompson is no longer employed by Respondent, she may again be so employed in the future, and this action by Respondent is necessary to dissipate the effects of its prior unlawful conduct against her.

It is also recommended that Respondent be required to post appropriate notices, to expunge from its personnel records all references to its unlawful discharges of Ricky Reeves and Mike Collier, and to notify each of them in writing that such expunction has been made and that evidence of their unlawful discipline will not be used as a basis for future personnel actions against them.

The General Counsel has filed an extensive brief recommending that a visitorial clause be included in their remedial order. In O. L. Willis, Inc., 278 NLRB No. 29 (1986) the Board in similar circumstances found it unnecessary to include such a clause. I reach the same conclusion herein.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

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[122] Plasticrafts, Inc., 234 NLRB 762, 768 (1978) enfd. as mod. 586 F.2d 185, 99 LRRM 3204 (10th Cir. 1978); Our Way, Inc., 268 NLRB 394, 421-422 (1983).

[123] Supra, fn. 116.

[124] Clements Wire, supra, fn. 118.

ORDER[125]

The All American Gourmet Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that it will call the police on them because they are engaged in protected activities.

(b) Telling employees that they may not discuss their terms and conditions of employment with anybody other than Respondent's supervisors.

(c) Discouraging membership in Service Employees International Union, Local 579, AFL-CIO or any other labor organization, by discharging employeees because of their union or other protected, concerted activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment or terms and conditions of employment.

(d) Unilaterally changing its disability policies without giving advance notice thereof to the above-named labor organization or without affording it an opportunity to bargain over such matters.

(e) Unilaterally changing its policy regarding periodic raises to employees without giving advance notice thereof to the above-named labor organization or without affording it an opportunity to bargain over such matters.

(f) Unilaterally laying off employees without giving advance notice thereof to the above-named labor organization or without affording it an opportunity to bargain over such matters.

(g) In any other like or similar manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Offer Ricky Reeves and Mike Collier full reinstatement to their former positions, or, if any such position no longer exists, to a substantially equivalent position, without prejudice to the seniority or other rights and privileges of either of them, and make them whole for any loss of earnings either of them may have suffered by reason of Respondent's unlawful discharges of them on 4 November 1986 in the manner described in the section of this Decision entitled "The Remedy."

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[125] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Expunge from its personnel records or other files any reference to its discrimination against the employees named above, and notify each such employee in writing that this action has been taken and that evidence of his unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Withdraw its recission on 16 June 1986 of its policy of paying disability pay for the first three days of disability, reinstate its prior disability policy providing for such payment, and publish notices thereof on all bulletin boards maintained by the Company and, with the Union's consent, bulletin boards maintained by its employees.

(d) Make whole any employee who may have suffered a loss of disability pay because of Respondent's unlawful change of its disability policy on 16 June 1986, in the manner described in the Section of this Decision entitled "The Remedy."

(e) Notify the above-named labor organization prior to any proposed change in disability pay policy, and, upon request, bargain with it concerning such proposed change.

(f) Make its employees whole for its unlawful failure to give them a periodic raise in December 1986 in the manner described in the Section of this Decision entitled "The Remedy."

(g) Notify the above-named labor organization prior to any change in its policy of giving periodic pay raises to its employees twice yearly, and upon request, bargain with the Union over this matter.

(h) Offer reinstatement, to his or her former position, to any of the following employees whom it has not yet reinstated:

Ethel Hill
Linda Wright
Paulette Ellison
Valerie Berry
Scedro Williams
Mary Davenport
Sherry Nelson
Charlanda Wyser
My Diep
Arthur Thomas
Patricia Jones
Kinh Tua Nguyen
Dieu Minh Hoang
Minh Pham Hoang
Charles Boyd
Veester Murphy
Celestine Lawrence
Penny Stembridge
Ida Howell
Canetra English
Gwen Wright
Brenda Parks

(i) Make whole the employees named immediately above for any loss of earning they may have suffered because of Respondent's unlawful layoff of them on 23 Febarury 1987, in the manner described in the Section of this Decision entitled "The Remedy."

(j) Notify the above-named labor organization prior to any proposed future layoff of employees, and, upon request, bargain with it over this matter.

(k) Notify Amelia Thompson in writing at her last-known address that, upon her return to employment, if any, the prior order prohibiting her from discussing the terms and conditions of her employment with anybody except Respondent's supervisors is withdrawn, and that she is free to discuss such matters with anybody.

(l) Preserve and, upon request, make available to the Board or its agents for copying, all payroll records, social security payment records, timecards, disability and absentee records, budget analyses and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(m) Post at its 5475 Bucknell Drive, Atlanta, Georgia facility, copies of the attached notice marked "Appendix."[126] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(n) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the Employer's Objections to the Election in Case 10-RC-13308 be overruled in their entirety, and that a Certification of Representative issue designating the above-named labor organization as the representative of the employees in the unit specified above in Conclusion of Law No. 5.

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[126] In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT OT A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated at Washington, DC 9 February 1988

Howard I. Grossman

Howard I. Grossman
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees that we will call the police on them because they are engaged in protected, concerted activities.

WE WILL NOT prohibit employees from discussing the terms and conditions of their employment with anybody except our supervisors.

WE WILL NOT discourage membership in Service Employees International Union, Local 579, AFL-CIO, or any other labor organization, by discharging employees because of their union or other protected, concerted activities.

WE WILL NOT unilaterally change our disability policies or our policy on periodic raises to employees, nor will we unilaterally lay off employees, without first giving the above-named Union notice thereof and an opportunity to bargain over these matters.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL offer Ricky Reeves and Mike Collier full reinstatement to their former jobs, rights, and privileges, and **WE WILL** make them whole for any loss of earnings they may have suffered by reason of our unlawful discharges of them, with interest.

WE WILL expunge from our personnel records all references to our unlawful actions concerning Ricky Reeves and Mike Collier, and notify them in writing that such action has been taken and that evidence of such action will not be used as a basis for future personnel actions against them.

WE WILL withdraw our rescission of our former policy of paying disability pay for the first three days of disability, reinstate such policy, and make whole with interest any employees who suffered losses because of our unilateral change in such policy on 16 June 1986.

WE WILL offer reinstatement to any of the employees whom we unlawfully laid off on 23 February 1987 that we have not yet reinstated, and make the whole with interest for any losses they may have suffered thereby.

WE WILL give the above-named Union notice and an opportunity bargain before we institute any future changes in our disability periodic raise policies, or before we lay off employees.

WE WILL notify Amelia Thompson in writing that, upon her employment with us, if any, she is free to discuss the terms and of her employment with anybody.

THE ALL AMERICAN GOURMET COMPANY
(Employer)

Date: ______________________ **By:** ______________________________
(Representative) (Title)

This is an official notice and must not be deface by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, Marietta Tower - Suite 2400, 101 Marietta Street, N.W., Atlanta, Georgia 30323. Telephone: (404) 331-2886.